REPORT ON

ADMINISTRATIVE JUSTICE IN NEW ZEALAND

G. S. ORR

REPORT ON

ADMINISTRATIVE

JUSTICE

IN NEW ZEALAND

This report is concerned with the adjudication of disputes between State and citizen which arise in a wide variety of ways and are of increasing significance in the welfare state.

In the first Part, the constitution, powers, and procedure of the great majority of New Zealand's administrative tribunals and boards are described with suggestions for their improvement.

An Administrative Procedure Act to regulate these tribunals is recommended, and detailed proposals are made for an Administrative Court to sit as an appeal authority over tribunals and certain administrative decisions. A statutory right to a hearing is advocated before the rights, property, or livelihood of citizens are adversely affected by the exercise of statutory powers. Other recommendations include the abolition of the prerogative writs and the substitution therefor of a simple uniform means of judicial review. The powers of the Ombudsman and his place in the overall system of administrative justice are discussed.

The report is intended to stimulate thought and, it is hoped, action towards securing much-needed reforms in this important field.

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IN NEW ZEALAND

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IN NEW ZEALAND

by

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Foreword

I welcome the decision of the Government Printer to publish Mr Orr's *Report on Administrative Justice in New Zealand.* In 1961 Mr Orr was granted leave from his position as Crown Counsel in the Crown Law Office, Wellington, on being awarded a Harkness Fellowship of the Commonwealth Fund of New York which he took up at Harvard University. This *Report* is the result of his work there and his accumulated experience arising from extensive appearances both before and on behalf of a wide variety of administrative tribunals.

The *Report* is valuable for a number of reasons. It contains a description and analysis of the great majority of our administrative tribunals. I believe this to be the first occasion on which a systematic attempt has been made to review the powers and procedures of these numerous bodies.

Mr Orr advances a detailed and reasoned case for an Administrative Procedure Act to regulate the procedure of our administrative tribunals; he advocates a statutory right to a hearing in all cases where the rights of citizens are adversely affected by the exercise of statutory powers; and he formulates the case for an Administrative Court. While neither the Government nor I personally should be taken as necessarily agreeing with Mr Orr's various proposals, I am confident that their publication will assist materially in stimulating thought and future action in the increasingly important area of administrative justice.

Wellington,
10 March 1964.

J R Hanan
Attorney-General.

Preface

This *Report* was written during my tenure of a Harkness Fellowship of the Commonwealth Fund at the Harvard Law School in 1961–62. It has since been revised to take account of amendments and additions to the law up to the end of 1963.

I have not attempted to deal with every administrative tribunal or board in New Zealand but I believe the great majority have been covered. The task of identifying these statutory bodies was considerably lightened by information kindly made available to me by the New Zealand Department of Justice.

I must record my great indebtedness to the officers of the Fellowship Division of the Commonwealth Fund for their unfailing kindness and assistance throughout my sojourn in the United States.

While at the Harvard Law School I was provided with every facility, including a pleasant office in Langdell Hall with ready access to the Law School's incomparable library. All New Zealand material I required was to be found there. I am especially grateful to Professor Albert M. Sacks, a co-author of the Massachusetts Administrative Procedure Act for his guidance. I have not hesitated to borrow from this Act in my proposals for somewhat similar legislation here. To Professor Louis L. Jaffe I am indebted for many insights into the complex field of American administrative law.

Professor H. W. R. Wade of St. John's College, Oxford, was good enough to read the typescript and make a number of suggestions.

I should perhaps emphasise that the various proposals for reform are my own; they in no way bear the imprint of the Crown Law Office or the New Zealand Government in whose service I am employed.

Acknowledgment is duly made for permission to quote from three volumes published by Stevens and Son Ltd. and from the *Treatise on Administrative Law* by Professor K. C. Davis.

Finally, I record my gratitude to my wife who painstakingly converted my rough drafts into typescript and corrected some of my worst infelicities of style.

Crown Law Office, G.S.O.
Wellington.

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PART I

1

Introduction

1. In this report an attempt is made to review the system of administrative justice in New Zealand in the light of experience both here and abroad and to suggest certain reforms. Specifically, the report is concerned with the practice and procedure of administrative tribunals and the review by the courts of administrative action.

2. As the welfare state has developed, government has become increasingly involved in the daily lives of many citizens. This extension of government activity is inevitable if the people are to enjoy the various services which they ask and expect the state to provide. Moreover New Zealand, in common with many modern states, has found it necessary to regulate certain areas of economic activity. In the United States of America, for instance, government, by means of so-called independent regulatory agencies, regulates the airlines, railroads, trucking and water transport, utilities (gas and electric power), the issue and exchange of securities, unfair trade practices, labour relations, and radio and television, to name some of the more important. In New Zealand the adjudication of disputes arising out of regulatory control over various sections of the economy has, for the most part, been vested in administrative tribunals of one kind or another, and not in the courts of justice. No very rational principles underlie the formation and composition of many of these tribunals. Their structure and powers largely depend on the particular inclinations of the Minister responsible at the time. There may or may not be a right of appeal in part or in whole. The most consistent feature is the presence of a privative clause purporting to impose finality on the tribunal's actions and seeking to frustrate the citizen in any attempt to have the legality of the tribunal's actions tested in the Supreme Court. In more recent years, as a concession to the inevitable, legislation establishing these tribunals has recognised the right of the Supreme Court to rule on questions of jurisdiction, a right which the Supreme Court has consistently asserted on the principle that privative clauses can only be effective if confined to decisions made by the tribunal acting within its jurisdiction. What is, and what is not, a question of jurisdiction is, however, by no means settled.

GROWTH OF TRIBUNALS

3. For the most part, administrative tribunals and public authorities operate independently of the regular courts. In doing so, they have created a considerable body of law. It is impossible to assign these tribunals to any strict categories. Some, like the Arbitration Court and the Price Tribunal, are principally engaged in legislative activity. Yet the very process of settling an award or promulgating a price order requires the Court or Tribunal, as the case may be, to act fairly towards the parties immediately affected and afford them a hearing. Again, many of our tribunals are concerned with licensing of one kind or another and operate under fairly specific statutory directions from the Legislature. Yet in all of them there remains a considerable degree of discretion in determining whether to grant or deny, amend, suspend, or revoke a licence.

4. But despite the criticisms which can be made of the medley of administrative tribunals which has grown up in response to a wide variety of pressures rather than according to any consistently applied legal principles, few would now suggest that their work should be transferred to the regular courts. In Britain the Committee on Administrative Tribunals and Enquiries (the Franks Committee) expressed the view that:

> (r)eflection on the general social and economic changes of recent decades convinces us that tribunals as a system of adjudication have come to stay. The tendency for issues arising from legislative schemes to be referred to special tribunals is likely to grow rather than to diminish.[1]

5. There are several reasons why administrative tribunals have developed alongside the ordinary courts as law-making adjudicatory bodies. First, the problems they dealt with were foreign to the regular courts and could better be handled by persons with special qualifications. Secondly, the ordinary courts were said to be slow and cumbersome and governed by over-stringent rules of evidence and procedure. Thirdly, the courts were too expensive for the citizen whose dispute with the state may be over a matter of little monetary value but of considerable personal importance to the litigant. Fourthly, the ordinary courts would become seriously overburdened or, if sufficient additional judges were appointed, the high quality of Supreme Court personnel would be in danger of dilution.

6. Despite the increasing importance of these tribunals in the daily life of our community they continue to multiply in a haphazard fashion, and so far no real attempt has been made to organise

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[1] Committee on Administrative Tribunals and Enquiries, Report, CMMD. 218 (1957) (hereinafter cited as Franks Report), par. 37 at 8.

them into any kind of coherent framework. There has been little, if any effort made to view them as a whole. Instead, each one operates independently, left almost completely free to adopt, or not to adopt, a settled form of procedure, and in most cases subject to being overruled in one or more of a variety of ways by an appeal authority whose identity or status can rarely be gathered from the enabling statute.

7. In 1949 Sir Alfred Denning (as he then was), in the course of his Hamlyn Lectures on justice between man and the state, described the working of English administrative tribunals and expressed the view that:

> (t)here is no doubt that the new tribunals in England do constitute a set of administrative courts: but they have grown up in so haphazard a fashion that it is difficult to fit them into any recognizable pattern: and one of the most important tasks of the lawyers of today is to mould them into a coherent system of courts which will keep a just balance between the claims of the community on the one hand and the freedom of the individual on the other. There is no need for the ordinary courts to be jealous of the new tribunals. It should be recognized that they are a separate set of courts dealing with a separate set of rights and duties. Just as in the old days there were the ecclesiastical courts dealing with matrimonial causes and the administration of estates – and just as there was the Chancellor dealing with the enforcement and administration of trusts – so in our day there are the new tribunals dealing with the rights and duties as between man and state. The great need is to work out the principles and procedure which should govern these tribunals.[1]

THE FRANKS COMMITTEE

8. In Britain the opportunity was taken in 1955 to hold an extensive and detailed inquiry into the constitution and working of the many British administrative tribunals. The report of the Franks Committee, which conducted the investigation, was handed down in 1957 and was based on voluminous evidence from government departments, a host of organisations, including several groups from the legal profession, and a good number of private individuals, some of whom had a highly specialised knowledge of the problems inherent in this system of administrative justice.

9. In view of the very detailed source of information available in the published evidence on problems analagous to those in New Zealand, it is doubtful whether a similar lengthy and detailed investigation is called for here. This is not to say, however, that all the conclusions arrived at by the Franks Committee ought necessarily to be applied in New Zealand. Reasons will be given later

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[1] Sir Alfred Denning, *Freedom under the Law* 80–81.

in this report for the adoption of some of the Franks Committee recommendations and the rejection of others. Moreover a number of suggestions for reform put in evidence, but rejected by the Committee, will be urged for adoption here.

10. A number of witnesses before the Franks Committee, and possibly the Committee itself, found themselves frustrated by the limitations of the Committee's order of reference. This was confined to two matters, one of which was the constitution and working of administrative tribunals and the other the working of such administrative procedures as the holding of inquiries or hearings by, or on behalf of, a Minister on an appeal or as the result of objections with particular reference to the compulsory purchase of land. The second area of inquiry, although a critical and controversial one in Britain, is of little significance here. This is chiefly because owners of land acquired by the state in New Zealand are adequately compensated. Also we have not been faced with the problem of replanning bomb-damaged cities and, to a limited extent only, with the renewal of decadent urban areas. The Franks Committee itself recognised that there would be far fewer objections to the compulsory purchase of land if owners were adequately compensated.[1]

11. The terms of reference did not extend to the extensive area of administrative decisions made by government departments and local authorities in the course of the day to day execution of their statutory powers. Such decisions affect the citizen as vitally as do the more formal decisions of administrative tribunals. In the words of the Franks Committee:

> (i)t may be thought that in these cases the individual is less protected against unfair or wrong decision. But we are not asked to go into questions of maladministration which may arise in such cases.[2]

THE WHYATT COMMITTEE

12. In an effort to fill the gap unavoidably left by the Franks Committee, the British Section of the International Commission of Jurists (known as "Justice") appointed a Committee under the chairmanship of Sir John Whyatt, a former Chief Justice of Singapore, to investigate and report. The terms of reference of this Committee were:

> To enquire into the adequacy of the existing means for investigating complaints against administrative acts or decisions of Government Departments and other public bodies, where there is no tribunal or other statutory procedure available for dealing

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[1] Franks Report, par. 278 at 61.

[2] idem, par. 14 at 3.

> with the complaints; and to consider possible improvements to such means, with particular reference to the Scandinavian institution known as the "Ombudsman".[1]

The Committee received the cooperation of certain selected government departments, who supplied details of their exercise of discretionary powers and in some cases of self-imposed informal appeal procedures. The Committee came to two major conclusions. The first was that there was a need to afford a right of appeal to an independent authority where a citizen was aggrieved by discretionary decisions which adversely affected his interests, though there would be cases where "overriding considerations (would) make it necessary, in the public interest, for the final decision to be left with the Executive".[2] To facilitate this right of appeal the Committee recommended that the Council on Tribunals (a product of the Franks Committee) should have power to survey the uses of discretion where decisions are not at present subject to appeal and to make proposals to bring such areas within the tribunal system where it seemed appropriate to do so. A subsidiary recommendation under this head was that a

> General Tribunal should be established to deal with appeals from miscellaneous discretionary decisions which cannot suitably be allocated to specialized tribunals.[3]

13. The second major conclusion of the Whyatt Committee was that a Parliamentary Commissioner should be appointed to receive and investigate complaints of maladministration against government departments. The proposed Parliamentary Commissioner, in line with his counterpart Ombudsman in Denmark, Norway, and Sweden,[4] would have no power to deal with complaints against discretionary decisions unless it appeared that the discretion had been so abused as not to amount to a genuine exercise of discretion. That the jurisdiction of the Scandinavian Ombudsman is so limited is probably not widely known in New Zealand; certainly the recently enacted Parliamentary Commissioner (Ombudsman) Act 1962 appears to recognise no such limitations in the powers of the New Zealand Ombudsman.

14. The defect in the work of the Whyatt Committee is its failure to investigate the efficacy of existing methods of judicial review by the regular courts of the exercise of administrative discretion. It may have felt that if its recommendations were adopted the role

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[1] Report by Justice, *The Citizen and the Administration*, 1961 (hereinafter cited as Whyatt Report).

[2] idem, par. 165 at 79.

[3] idem, par. 167 at 80.

[4] idem, par. 18 at 10.

of the courts would substantially diminish. A good deal of informed criticism was made in evidence before the Franks Committee of the inadequacies of the prerogative writs or orders as a means of securing effective judicial review of administrative action. The Franks Committee dismissed this criticism as unfounded but avoided any real discussion of the issues involved.[1]

AMERICAN EXPERIENCE

15. Yet it can scarcely be disputed that a central problem of the welfare state is to find satisfactory means of reconciling the competing interests of state and citizen. A leading American commentator, Robert M. Benjamin,[2] in a highly authoritative report on the adjudicating and rule-making procedures of the New York State administrative agencies and the New York system of judicial review, has written:

> Put in its most general terms, the problem with which the report is concerned is the problem of reconciling, in the field of administrative action, democratic safeguards and standards of fair play with the effective conduct of government. To state the problem in these terms is not to say that the elements to be reconciled are essentially opposite and conflicting. On the contrary, each of them should contribute to the fulfillment of the other. Government effective in accomplishing the purposes of a democratic society is itself a safeguard of the democratic tradition, if not indeed a condition of its survival. The safeguards and standards of fair play can themselves contribute to the effectiveness of democratic government.[3]

16. In America where, contrary to a not uncommon image in the minds of many foreigners, a considerable number of economic activities are regulated, and the administration, be it federal or state, reaches down to matters affecting the livelihood, business, safety, and health of most citizens, great emphasis has been placed on the desirability of procedural safeguards. Because many of the regulatory functions are vested in so-called independent agencies rather than shared between government departments and administrative tribunals, different problems arise. Nonetheless both the federal Administrative Procedure Act 1946 and the various state Administrative Procedure Acts offer valuable pointers, some of which, with appropriate modifications, could with advantage be adopted in New Zealand. They will be discussed in their appropriate context later in this report.

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[1] Franks Report, par. 117 at 27–28.

[2] Leading member of the New York Bar, Chairman, American Bar Association Special Committee on Code of Administrative Procedure; Consultant on Administrative Law, Indian Law Institute, New Delhi.

[3] Robert M. Benjamin, *Administrative Adjudication in the State of New York* 9 (1942).

PARLIAMENTARY COMMISSIONER (OMBUDSMAN)

17. In 1962, in a bold constitutional innovation, the New Zealand Legislature passed the Parliamentary Commissioner (Ombudsman) Act. This is, in itself, a recognition of the inadequacy of present methods of controlling the exercise of statutory authority by administrators who frequently enjoy wide discretionary powers. The powers and functions of the Ombudsman are discussed more fully in Chapter 17 of this report. Suffice it to say at this juncture that there is in New Zealand no general legislative provision requiring an administrative authority to afford a reasonable hearing, adequate to the circumstances of the particular case, to citizens likely to be adversely affected by administrative action. So long as this safeguard is lacking, irreparable damage, otherwise avoidable, may ensue which subsequent intervention by the Ombudsman cannot wholly repair.

18. In any discussion of administrative procedure it is obviously essential to bear in mind that the proper function of a government is to govern in the interests of the community as a whole and this will necessarily frustrate sectional and private aims and interests from time to time. The emphasis in this report on the rights of the citizen in his encounters with administrative authority stems not from any desire to deprecate the legitimate functions of government but rather because the scales appear at times to be unduly weighted against the citizen. It is difficult to believe that fair administration is attainable only at the price of weak or inefficient government. In the words of the Franks Committee:

> . . . Administration must not only be efficient in the sense that the objectives of policy are securely attained without delay. It must also satisfy the general body of citizens that it is proceeding with reasonable regard to the balance between the public interest which it promotes and the private interests which it disturbs. . . .[1]

The purpose of this report is to suggest means by which this balance may better be maintained.

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[1] Franks Report, par. 21 at 5.

2

Scope of this Report

19. In succeeding chapters proposals will be made for a general code to regulate the practice and procedure of administrative tribunals. The necessity for such a code and its implications can be properly appreciated only if the constitution and procedures of our numerous tribunals are first described. This is attempted in the ensuing eight chapters where suggestions for granting or extending appeal rights and otherwise improving the operation of tribunals will be made. In a subsequent chapter detailed proposals for the establishment of an Administrative Court will be formulated; a principal function of the proposed court being to hear appeals from administrative tribunals. Other functions of the court will be suggested in later parts of the report.

20. Part IV of the report will be concerned with the right to a hearing. Concrete proposals will be made for ensuring that any person whose rights, property, or livelihood are affected by administrative action shall first receive a hearing.

21. In Part V the present scope of judicial review of administrative action will be examined and suggestions made for simplifying court procedure and extending the scope of review. Part VI will be concerned with the need for granting appeal rights in the areas of administrative decisions which give rise to the greatest friction between the citizen and those exercising statutory powers. Comments on the place of the Ombudsman in the context of the proposals set out in this report will be made in Part VII. The final chapter (Part VIII) will contain a summary of conclusions and recommendations.

3

Tribunals Concerned With Licensing

22. In this section a group of tribunals having one common feature, namely licensing, will be reviewed. These tribunals are concerned with a wide range of economic activities and display considerable variation in their constitutions.

EXHIBITION OF CINEMATOGRAPH FILMS

23. The Cinematograph Films Licensing Authority was set up in 1960 and is now constituted under the Cinematograph Films Act 1961. It was established shortly after the Supreme Court decision in *Modern Theatres Ltd.* v. *Peryman*[1] in which the Court expressed serious doubt as to whether a licensing officer was under any duty to act judicially in determining an application for the issue of an exhibitor's licence. As constituted, there can be little doubt that the new Authority is required to so act in considering such applications and in exercising other regulatory functions under the Act. The Authority comprises three members, one of whom, an officer of the Internal Affairs Department, is to be Chairman and removable at the pleasure of the Governor-General. The others are each required to have special knowledge of the film industry and hold office for three years and may be reappointed from time to time. They are removable for good cause. The Authority is deemed to be a commission of inquiry under the Commissions of Inquiry Act 1908 and may determine its own procedure.

24. The composition of this tribunal reflects the now classic justification for administrative tribunals in that it calls for special knowledge of the licensed industry on the part of two of its three members. Moreover one of these members may be a member of the industry while the other is prohibited from having any financial interest in the exhibition or renting of films. It is open to grave doubt whether the third member, who is Chairman, should be a departmental officer. It is surely preferable that departmental

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[1] [1960] N.Z.L.R. 191.

officers should not sit on administrative tribunals if a possible conflict of interest is to be avoided. The Authority is required to sit in private for reasons which are not altogether apparent. Apart from this the Act typically leaves the Authority master of its own procedure.

RIGHT OF APPEAL

25. There is a right of appeal from any decision of the Licensing Authority to a Cinematograph Films Licensing Appeal Authority. The appeal provisions are fuller than many found in earlier statutes and reflect more detailed thought on the part of the Legislature. Similar provisions appear in other recent statutes. For ease of reference the relevant sections are reproduced in Appendix A of this report.

26. The appeal provisions may be briefly stated. The Appeal Authority must be a barrister and solicitor of the Supreme Court of not less than seven years' standing and may be the holder of judicial office. In fact the first appointment was an additional Judge of the Arbitration Court, who also held office as appeal authority under other statutes. The Appeal Authority holds office for four years and may be reappointed from time to time. He is expressly required to sit as a judicial authority for the determination of appeals from any decision of (1) the Licensing Authority, (2) the Registrar in respect of the registration of any film, and (3) the Cinematograph Film Projectionist Licensing Board. He is free to admit any evidence that may in his opinion assist him to deal effectively with the matters before him whether or not such evidence would be otherwise admissible in a court of law. At the hearing of any appeal he is required to hear all the evidence tendered and all representations by or on behalf of the appellant or other persons as he deems relevant. In his determination of any appeal the Authority may confirm, modify, or reverse the decision appealed against. He thus stands in every respect in the shoes of the specialised Licensing Authority. This is noteworthy in as much as the Appeal Authority, whose sole qualifications for office are legal, is given an unfettered power to determine the appeal as on a rehearing. He may reverse or modify a decision arrived at by persons in the lower tribunal having a special knowledge of the film industry. Nor, as will be seen, is this a unique power. It is to be found in a number of statutes.

27. Instead of determining the appeal, the Appeal Authority may direct the Licensing Authority to reconsider the matter. In so doing, the Appeal Authority must advise the Licensing Authority of his reasons for requiring it to reconsider the matter; and the Licensing Authority must have regard to these reasons. This provision enables the Appeal Authority to refer back a matter

which he may consider the Licensing Authority better qualified to determine in the light of the guidance given in his redirection. It thereby enables technical questions to be decided by those best qualified and at the same time ensures that the lower tribunal is kept within its jurisdiction and finally determines the matter on the basis of proper considerations.

28. The Act provides for an appeal to be instituted in the prescribed form and the hearing is to be in public unless otherwise determined by the Appeal Authority. In other respects the procedure on appeal is determined by the Authority.

29. The privative clause is typical of many appearing in similar legislation and merits being quoted in full. Section 84 provides:

> Proceedings before the Licensing Appeal Authority shall not be held bad for want of form; and no appeal shall lie from any order of the Licensing Appeal Authority; and, except on the ground of lack of jurisdiction, no proceeding or order of the Licensing Appeal Authority shall be liable to be challenged, reviewed, or called in question in any Court.

The desirability of provisions such as this excluding judicial review except on jurisdictional grounds is open to serious question. Suffice it to say at this stage that, if an error of law appears on the face of the Appeal Authority's decision, it is difficult to understand why the Supreme Court should be prohibited from correcting the error.

FILM CENSORSHIP

30. Section 91 of the Act establishes a Cinematograph Films Censorship Board of Appeal for the purpose of hearing appeals against the Film Censor. The Board consists of three persons to be appointed by the Minister for a term of not more than three years, and they are eligible for reappointment. The Chairman is appointed by the Minister. No qualifications for appointment are laid down. Presumably the Board will be comprised of persons reflecting the prevailing mores of the community. An appellant is entitled to be legally represented at the hearing. The Board has wide powers to uphold, vary, or reverse the Censor's decision or recommendation or to refer it back with a direction for reconsideration. The Board's decision is made final in the same way as that of the Appeal Authority.

FILM REGISTRATION

31. Under the Cinematograph Film and Posters (Censorship and Registration) Regulations 1956 any applicant dissatisfied with the Registrar's decision on the registration of a film was entitled to appeal to a Stipendiary Magistrate. The appeal had to be heard in Wellington in accordance so far as practicable with the ordinary procedure of the Magistrate's Court in originating applications.

This provision, until repealed in 1961, was one of a number appearing in various statutes which confers a right of appeal from an administrative decision to a Magistrate. Under the 1961 Act the right of appeal was transferred to the Cinematograph Films Licensing and Registration Appeal Authority, a much more satisfactory appellate body than a Stipendiary Magistrate, who will have no knowledge of the film industry.

TIMBER PRESERVATION

32. The Timber Preservation Authority is established by the Timber Preservation Regulations 1955 and comprises 11 members, five of whom are members of Government Departments, and six are appointed on the nomination of outside interests. Every person appointed must, in the opinion of the appointing Minister, possess some special knowledge or qualification which will be of advantage to the Authority. Nominated members are appointed for a term of two years and Government members hold office at the pleasure of the Minister. The Authority may regulate its procedure as it thinks fit.

33. The principal function of the Authority is to secure and maintain a high standard of timber preservation. In particular it may grant, revoke, or suspend any authorisation of any preservative treatment. Any authorisation granted by the Authority may at its discretion be varied or may be suspended for a period not exceeding one month. The Authority is required to give the holder of an authorisation at least 14 days' notice in writing of its intention to revoke an authorisation and to state its reasons for the proposed revocation. The Authority thus has power to initiate revocation proceedings and acts as both Prosecutor and Judge. The regulations make no provision for a hearing before revocation and do not even require notice to be given of suspension or variation of an authorisation.

APPEAL

34. An objection to any revocation lies to the Minister, who must appoint a suitable person "to inquire into and determine the subject matter of the objection". This person may call for any reports he needs to ascertain the facts of the case and he may then require the Authority to affirm, vary, or reverse its previous decision.

35. The foregoing provisions are heavily weighted against timber preservers who come into conflict with the Authority, and the appeal provisions are far from satisfactory. Very substantial sums may well be involved in setting up timber-preservation

plants, and the owners or operators should receive more protection than these regulations afford. An appellant has no means of knowing who the Appeal Authority is, nor the extent of his rights on appeal. A Judge of the proposed Administrative Court would be a suitable Appeal Authority, and an appellant would be assured of a proper hearing.

STOCK REMEDIES

36. The Stock Remedies Registration Board is constituted by the Stock Remedies Act 1934 and comprises seven members of whom one is appointed by the Governor-General from among veterinary surgeons in the service of the Department of Agriculture to be Chairman. Of the six other members, one is appointed on the nomination of the New Zealand Veterinary Association, the Pharmacy Board, and the Veterinary Services Council respectively. The remainder constitute a medical practitioner employed in the Health Department appointed on the nomination of the Minister of Health, an analytical chemist employed in the New Zealand Public Service on the nomination of the Minister of Agriculture, and one person appointed by the Minister of Agriculture after consultation with the Federated Farmers of New Zealand Inc. The Chairman holds office during the pleasure of the Governor-General, and the remaining members for three years. The principal function of the Board is to approve applications for registrations of stock remedies which cannot be sold unless registered. The Board is empowered to regulate its own procedure. The Board may refuse to register a stock remedy on grounds specified in section 6 of the Act.

APPEAL

37. A right of appeal lies to a Magistrate's Court against the refusal of the Board to register any stock remedy or to approve any label or advertisement or the revocation of the registration of a remedy. The Court may confirm or reverse the decision of the Board and its decision is final. In dealing with any appeal the Court has all the powers vested in it in its civil jurisdiction. As with appeals against the Registrar's decision with respect to films, this appeal could be determined by a Judge of the proposed Administrative Court with full power to decide or refer back as he thought fit.

NO APPEAL

38. No appeal lies against the decision of the Minister who, under section 9A of the Act, has power to prohibit the importation

of biological products into New Zealand. This power may in fact be exercised, not by the Minister, but by the Director-General of Agriculture or, with the consent of the Minister, by other officers of the Department. In the absence of any compelling reason to the contrary a right of appeal should be granted and again could lie to a Judge of the proposed Administrative Court.

NO APPEAL

39. Nor is there any right of appeal against the decisions of the Stock Remedies Registration Board under the Stock Remedies (Biological Products) Regulations 1951. Under these regulations any person intending to build any premises for use in the manufacture of biological products or to make structural alterations to any building for such use must first have his plans approved by the Board. No one may engage in the manufacture of any biological product unless he holds a principal technician's licence from the Board. Any principal technician's licence may be revoked for the reason (*inter alia*) that "in the opinion of the Board the quality of any biological product manufactured under his supervision is inferior to the quality that could be attained, having regard to all relevant circumstances". There is no provision for any hearing, and the regulations provide that the revocation of any such licence shall be effected by a declaration of revocation in writing served upon the licensee or sent to him by registered letter. The Board is not even required to state its reasons for revocation. There is no right of appeal against the Board's decision to revoke nor against its refusal to approve plans for the erection or alteration of a factory.

40. Regulation 18 requires every manufacturer of any biological product to hold a licence from the Board in respect of the premises in which he carries on business. By a notice in writing to a licensee the Board may amend or vary his licence by withdrawing the right conferred on the licensee to manufacture any biological product if the Board *is satisfied on such grounds as it shall deem sufficient* that the biological product manufactured under the licence has deteriorated or become dangerous or has become ineffective for its purpose. Again there is no provision for any hearing nor is there any right of appeal. Moreover the power of the Board to revoke a licence could scarcely be expressed in vaguer or more subjective terms.

41. It is difficult to see why a hearing should not be made mandatory before revocation, and a right to appeal also granted. Again, the proposed Administrative Court would be an appropriate forum on appeal.

MILK SUPPLY

42. "Milk authorities" may be either metropolitan milk boards or borough councils when so prescribed by Order in Council. The Milk Act 1944 provides that there is a milk authority for every milk district. The principal function of each milk authority is to ensure an adequate supply of milk of a standard quality. Each milk authority has power to buy, treat, and sell milk. In particular, the milk authority has power to require all milk vendors to have a licence. An authority may, with the prior written consent of the Central Milk Council, decide that on a fixed date all licences of any particular class are to be revoked. Before giving its consent, the Central Milk Council is required to give licensees likely to be affected an opportunity of making representations. No appeal lies against any revocation, but compensation is payable to licensees deprived of their licences. In the event of a dispute the amount of compensation is to be fixed under the provisions of the Public Works Act 1928.

LICENSING OF MILK VENDORS

43. A milk authority is empowered, in its discretion, to grant, renew, refuse, suspend, or revoke a licence. The authority has power to attach such conditions to the licence granted or renewed as it thinks fit.

APPEAL

44. Except as otherwise provided, any person aggrieved by a decision of a milk authority in refusing to grant any licence, or in revoking, suspending, varying, or refusing to renew any licence, or in attaching any condition to the licence of a roundsman restricting his operations, may appeal to a Magistrate's Court. On appeal the Court has all the powers vested in its civil jurisdiction, and the procedure for the institution, hearing, and determination of the appeal is to be in accordance with the regulations made under the Act; subject to these regulations it is to be in accordance with the ordinary procedure of the Court. The Milk Authorities Appeals Regulations of 1952 are bare in the extreme and provide only that an appeal is to be by way of an originating application under the Magistrates Court Rules, but make no provision for the procedure to be followed on appeal. Accordingly it took the Court of Appeal, in *Hammond* v. *Hutt Valley and Bays Metropolitan Milk Board*,[1] to settle this question when in 1958 it disapproved the procedure followed by a Magistrate in hearing an appeal and overruled the Supreme Court which had approved the Magistrate's procedure.

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[1] [1958] N.Z.L.R. 720.

In the *Hammond* case the Magistrate, who had only the unsuccessful applicant for a milk licence and the Board before him, failed to hold a full comparative hearing and instead limited himself to the legality and fairness of the Board's decision. After some discussion as to whether the appellant was entitled to relief in the form of mandamus, the Court of Appeal directed the issue of a writ requiring the Magistrate to hold a full comparative hearing. This expensive litigation could have been avoided had proper rules of procedure been formulated when the 1952 regulations were promulgated.

45. This is another case where the right of appeal lies to the Magistrate's Court. Again, such appeals could well be heard by the proposed Administrative Court. If the recommendations made later in the report as to procedural rules for the Administrative Court are implemented, the *Hammond* situation would not arise.

AIR TRANSPORT

AIR LICENSING

46. The Air Services Licensing Authority is constituted by the Air Services Licensing Act 1951. It is comprised of four members appointed for a term of three years by the Governor-General on the recommendation of the Minister in Charge of Civil Aviation. They may be reappointed, and no qualifications are stipulated. The principal functions of the Authority are to hear and determine applications for the grant, renewal, or transfer of licences and, for any of these purposes, to hold such inquiries and investigations as it thinks necessary. For the purpose of any hearing, inquiry, or investigation it is deemed to be a commission of inquiry. The Act requires public notice of any hearing of an application for a licence and stipulates in some detail the matters to be taken into account by the Authority in considering any application. The Authority may, of its own motion or on the application of the licensee, amend or revoke any of the terms or conditions of the licence or add any new terms. Before doing so it is required to give every person likely to be affected seven days' notice. The Act also empowers the Authority to revoke or suspend a licence after notice to the persons affected and a public hearing.

APPEAL

47. The Governor-General may from time to time appoint a suitable person who must be a barrister or solicitor of not less than seven years' standing to be the Air Services Licensing Appeal Authority. The functions of the Appeal Authority are to sit as a judicial authority for the determination of appeals from any decision

may give public notice of such applications and call for written representations, and in certain circumstances they must hold a public hearing. In addition the authorities are authorised at any time, and, if so directed by the Minister, are required, to hold a public inquiry as to whether or not any transport licence is being carried on in conformity with the terms and conditions of the licence. If, as a result of the inquiry, the authority is satisfied that the licensee is not carrying on the service in conformity with the licence, it may revoke or suspend the licence. There is also provision for public sittings to review licences, if an authority considers that the circumstances under which any transport licence was granted have since changed materially, with power to revoke or amend licences, if the Authority decides that it is necessary or desirable in the public interest so to do.

APPEAL

51. The Transport Licensing Appeal Authority who must be a barrister or solicitor of the Supreme Court of not less than seven years' practice whether or not he holds or has held any judicial office is appointed by the Governor-General for no fixed term. The function of the Appeal Authority is to sit as a judicial authority for the determination of appeals from any decision of a licensing authority. He has the powers of a commission of inquiry under the Commissions of Inquiry Act 1908.

52. The provisions of the Act governing evidence and procedure in appeal hearings are very similar to those in the Air Services Licensing Act 1951 with one important exception. The Transport Appeal Authority, in determining any appeal, is not bound to hear any person or to take any evidence or to receive any representation from any person. If the Appeal Authority decides not to grant a formal hearing he must, however, receive any written representations made by a person entitled to appeal. If the reason for relaxing this requirement of an oral hearing is that too much time would be taken, it is unsatisfactory. More probably, experience has shown that many appeals not involving disputed facts and questions of credibility can be just as fairly decided on the basis of the record of the evidence taken before the licensing authority, together with written representations in support of the appeal. Nevertheless it is not a practice which should be encouraged. In determining an appeal the Appeal Authority may confirm, modify, reverse, or refer back the decision appealed against. Decisions of the Appeal Authority are subject to the usual privative clause.

53. Both the Licensing Appeal Authority and the Charges Appeal Authority may, on the application of any party to the

of the Licensing Authority. The provisions of the Act governing evidence and procedure in appeal hearings, the powers of the Appeal Authority to confirm, modify, reverse, or refer back, and the privative clause are virtually identical with those in the Cinematograph Films Act 1961. The office of Appeal Authority is currently held by the Judge of the Valuation Court, who is also Chairman of the Waterfront Industry Tribunal and Transport Licensing Appeal Authority.

ROAD AND HARBOUR TRANSPORT

PASSENGER, GOODS, RENTAL, TAXICAB, AND FERRY-SERVICE LICENSING.

48. The Transport Act 1962 provides for the division of the country into such number of transport districts, in addition to the Auckland, Wellington, Christchurch, and Dunedin districts expressly provided for, as the Governor-General by Order in Council thinks fit. For each district there is to be a separate licensing authority.

49. Each licensing authority consists of one person or three persons as the Minister from time to time determines. In practice one person is appointed. The authority's tenure is for a term not exceeding five years. No special qualifications are called for by the Act. The function of licensing authorities is to grant and otherwise control passenger-service, goods-service, rental-service, taxicab-service, or harbour-ferry-service licences. All applications for a licence must be lodged in a prescribed form with the Commissioner of Transport. The Commissioner sends it on to the appropriate licensing authority together with all information in his possession (whether obtained from the applicant or not) that will assist the licensing authority in dealing with the application. It is a pity that the Act does not require the Commissioner to make such information available to the applicant and others affected since they should obviously have the right to rebut and comment on it. The licensing authorities are required to give 14 days' public notice of every application for a licence, with particulars of the date and place of hearing. They are required to sit in public and hear all evidence tendered (whether or not it is admissible in a court of law) and representations made that they deem relevant. The Act stipulates in some detail matters which the authorities are required to take into account in considering an application for a transport licence.

50. The licensing authorities also have jurisdiction over applications for the renewal, transfer, amendment, and voluntary suspension or abandonment of a licence. In their discretion they

proceedings or of their own motion, state a case for the opinion of the Court of Appeal on any question of law.

TRANSPORT CHARGES

54. Road and ferry transport charges are also regulated by the Transport Act 1962. Charges made in respect of any public transport service are to be fixed, reviewed, altered, or revoked by the public body operating the service or by the Transport Charges Appeal Authority as the case may be. Charges for transport services not owned by a public body may be fixed, reviewed, altered, or revoked by the Commissioner of Transport or the Transport Charges Appeal Authority as the case may be. No procedure is prescribed by the Act for the fixing or altering from time to time of transport charges by the public body or the Commissioner. The Act specifies the matters which they and the Appeal Authority must take into account. Subject to these considerations the public body or the Commissioner may make such investigations and inquiries as it or he thinks necessary in the circumstances of each case.

55. A privative clause precludes the proceedings and decisions of the public bodies and the Commissioner from challenge on grounds other than lack of jurisdiction but provides for a right of appeal to the Transport Charges Appeal Authority.

TRANSPORT CHARGES APPEAL AUTHORITY

56. The terms of appointment and qualifications of the Transport Charges Appeal Authority are identical with those of the Transport Licensing Appeal Authority, and in practice the same person occupies both offices. The functions of the Charges Appeal Authority are to sit as a judicial authority for the determination of appeals from any decision of a public body or the Commissioner or from any decision of the Minister of Railways fixing certain scales of charges in respect of road passenger services. In addition the Charges Appeal Authority may from time to time issue directions to the appropriate public body or the Commissioner, as the case may be, to proceed to fix or review the charges for any services. The Charges Appeal Authority must sit in public, unless on good grounds it rules otherwise, and hear all evidence tendered and all representations made. After the hearing, the Appeal Authority may confirm, discharge, or vary the order of the public body or the Commissioner or the Minister of Railways, as the case may be, and generally make such order as he considers just and equitable. Alternatively the Appeal Authority may refer the matter back for reconsideration. The usual privative clause applies.

MOTOR SPIRITS DISTRIBUTION

LICENSING AUTHORITY

57. The Motor Spirits Licensing Authority is constituted by the Motor Spirits Distribution Act 1953 and consists of a Chairman who is to be appointed as such and not more than two other members. The Act stipulates no qualifications for membership. Members are appointed by the Governor-General on the nomination of the Minister of Industries and Commerce and hold office during pleasure. The principal functions of the Licensing Authority are to consider and determine applications for the granting, transfer or amendment, revocation, or suspension of wholesale and retail motor spirits licences. The Authority is deemed to be a commission of inquiry for the purposes of any inquiry or investigation it may carry out. Hearings of licence applications must be in public, except for good cause, and the Authority must hear all evidence tendered and consider all representations which it considers relevant. The Act stipulates in some detail the matters to be taken into account by the Authority in considering an application for a licence. Provision is also made for the amendment or revocation of terms and conditions of licences or the revocation or suspension of licences, in each case after notice to affected parties and a hearing. There is a privative clause in the usual form with an added provision that any decision of the Authority may be appealed against.

APPEAL

58. The Motor Spirits Licensing Appeal Authority may be appointed from time to time by the Governor-General and must be a barrister or solicitor of not less than seven years' standing. His function is to sit as a judicial authority for the determination of appeals from any decision of the Licensing Authority. The provisions of the Act as to evidence and procedure on appeal hearings, the powers of the Appeal Authority to confirm, modify, reverse, or refer back are virtually identical with those in the Cinematograph Films Act 1961. The office of Appeal Authority is presently held by the Judge of the Compensation Court who is also Trade Practices Appeal Authority.

FURTHER RIGHT OF APPEAL

59. Where the effect of any decision of the Appeal Authority is to revoke or suspend, whether completely or otherwise, any licence other than a licence newly granted by the Licensing Authority and the subject of the appeal proceedings, the holder of the licence may appeal to the Supreme Court. Every such appeal to the Supreme Court is to be in the form of a case agreed upon by the Appeal Authority and the appellant or, if they cannot agree, the Court is

to hear the appeal without a case stated and in any case may receive evidence either orally or by affidavit or both these means. The procedure on any appeal is to be in accordance with the practice and procedure of the Court, which may reverse, modify, or confirm the decision appealed from. There is, however, no power to refer the matter back to the Appeal Authority and this is an unfortunate omission.

60. On its face this legislation appears to confer a full right of appeal to the Supreme Court. The reason for conferring such a right is not readily apparent, and in the light of the Supreme Court decision in *Central Taxi Depot (Rotorua) Ltd.* v. *New Zealand Retail Motor Trade Association*[1] it is doubtful if this additional appeal provision adds anything to existing rights. In this case Finlay J. ruled that the function of the Supreme Court was limited to ascertaining whether the discretion of the Appeal Authority had been properly exercised. If so, its decision is paramount and cannot be disturbed. The Court declined to assume the full appellate functions of the Appeal Authority and limited its own jursidiction to determining whether the decision of the Authority was based upon an error of law. But the Supreme Court already had this power, since the error of law appeared upon the face of the Appeal Authority's decision and was reviewable on certiorari proceedings. In the absence of any power to refer the matter back to the Appeal Authority for reconsideration in the light of the Court's ruling on the question of law, the appeal was decided, not on its true merits, but on a point of law which was not necessarily determinative of the matters in issue. If a provision of this kind is to remain, the Supreme Court should be given power to refer the matter back to the Appeal Authority in appropriate circumstances.

LIQUOR LICENSING

61. The Sale of Liquor Act 1962 consolidates and amends the 1908 Licensing Act and numerous amendments since that time. The present Act is bulky (some 320 sections) and in this brief survey the principal provisions only can be discussed.

LICENSING CONTROL COMMISSION

62. The Licensing Control Commission constituted under an earlier Act is continued in being. It consists of three or four members appointed by the Governor-General on the recommendation of the Minister of Justice, of whom one shall be appointed as Chairman. The term of office is five years.

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[1] [1959] N.Z.L.R. 1167.

FUNCTIONS OF COMMISSION

63. The principal functions of the Commission are:

(a) To hold such inquiries and gather such information as will enable it to determine the requirements of the public as to the provision of accommodation, services, and other facilities on licensed premises;

(b) To determine what new hotel, tavern, and tourist-house premises licences, restaurant licences, and wholesale licences should be issued from time to time, and to authorise the issue of such licences from time to time in accordance with the provisions of this Act;

(c) To determine the fair price to be paid in respect of new hotel, tavern, and tourist-house premises licences and wholesale licences, and in respect of the removal of such licences;

(d) To prescribe standards to be complied with in the provision of accommodation, services, and other facilities (as the case may require) for the public and for lodgers, guests, or employees, on licensed premises, whether in respect of licensed premises generally or any class or classes of licensed premises;

(e) To grant and renew club charters;

(f) To hear appeals from licensing committees pursuant to this Act;

(g) To control the Licensing Fund;

(h) To conduct inquiries into any matters at the request or with the approval of the Minister, and to make recommendations to the Minister as to the expediency of amending this Act.

The Commission is also empowered to fix, from time to time, minimum standards in respect of licensed hotels, taverns, tourist houses, and restaurants. The Commission may also issue statements to licensing committees setting out its views on the general administration of this Act or on the policy to be followed in its administration. In addition, the Commission may authorise any licensing committee to inquire into and report on any matter within the scope of the Commission's authority; it may also delegate to such committees certain of its powers and functions.

MEETINGS OF COMMISSION

64. At meetings of the Commission two members shall form a quorum, and the Chairman has a casting vote in the case of an equality of votes.

LICENSING COMMITTEES

65. The Act provides for the division of New Zealand into licensing districts and for every such district a licensing committee. Each committee consists of:

(a) A Magistrate appointed from time to time by the Governor-General on the recommendation of the Minister of Justice; and

(b) Four other qualified persons elected by local authorities in each district through representatives appointed by such authorities. These elections take place every three years after the local authority elections. In Auckland, Wellington, Christchurch, and Dunedin the respective city councils have the right to nominate the four members.

FUNCTIONS OF COMMITTEES

66. The principal functions of licensing committees are to consider applications for a variety of licences such as hotelkeepers' licences; wholesale, booth, works and canteen, wine-makers', and wine-resellers' licences. They are also responsible for renewing licences for hotelkeepers, tourist-house keepers, tavernkeepers and restaurant, wholesale, ship, and works canteen licences. In addition they have power to approve the transfer of restaurant, wholesale, and works canteen licences. Licensing committees may also, upon specified grounds, cancel or suspend any licence other than a hotel, tourist-house, or tavern-premises licence. This list does not purport to be exhaustive of the powers of committees but is sufficient to indicate their general functions.

MEETINGS OF COMMITTEES

67. At all meetings three members form a quorum and the Chairman has a casting vote in the case of an equality of votes.

PROCEDURAL PROVISIONS GOVERNING THE COMMISSION AND COMMITTEES

68. The following provisions apply (unless otherwise stated) to the Licensing Control Commission and every licensing committee:

(a) They are deemed to be commissions of inquiry under the Commissions of Inquiry Act 1908 with power to summon witnesses or the production of documents.

(b) *Power to Rehear:* They may, if they think fit, at any time rehear any matter already determined by them.

(c) *Public Sittings:* Whenever the Commission meets to hear any appeal or the Commission or any committee meets for any purpose which it is authorised or required to examine at a public sitting, it shall meet in public. Any other meeting may in their discretion be held in public or private. When holding a public sitting they may in their discretion hold any part of the sitting in private, if having regard to the interests of the persons being heard and to the public interest they think it proper to do so.

(d) *Counsel Assisting:* Any counsel or solicitor engaged by the Commission may appear and be heard as counsel assisting the Commission.

(e) *Representation of Parties:* Any person entitled to appear before the Commission or any committee may appear in person or by his counsel, solicitor, or agent and shall have the right to produce evidence and to cross-examine witnesses.

(f) *Evidence:* The Commission or any licensing committee may receive as evidence any statement, document, information, or matter that in its opinion may assist it to deal effectually with any matter before it, whether or not the statement, document, or matter would be admissible in a court of law.

(g) *Who May Appear Before the Commission and Committees:* In any proceedings the following may appear and be heard:

  (a) Any inspector under the Act;
  (b) Any member of the Police;
  (c) Any Medical Officer of Health or Health Inspector;
  (d) Any Chief Fire Officer;
  (e) Any person authorised by any local authority;
  (f) Any other person who satisfies the Commission or committee that he has an interest in the proceedings apart from any interest in common with the public.

(h) *Power to State a Case:* The Commission or any licensing committee may state a case for the opinion of the Supreme Court on any question of law arising in any proceedings before it. The provisions of section 78 of the Summary Proceedings Act 1957 with any necessary modifications apply to any such case stated.

(i) *Right of Member of a Committee to sit with Commission:* Where the Commission holds any public sitting to determine whether a new licence is required or an existing licence should be converted the licensing committee for the district may appoint one of its members (other than the Chairman) to sit with the Commission. Any such member is deemed for all purposes to be a member of the Commission.

GRANT, RENEWAL, TRANSFER, AND REMOVAL OF LICENCES

69. Part III of the Act contains detailed provisions regulating the grant, renewal, transfer, and removal of licences. The Commission is empowered to determine whether certain classes of new licences are required and to authorise the conversion of certain licences. It also has jurisdiction, subject to the right of delegation to a committee, over the removal of licences. Machinery matters such as renewal and transfer of licences are dealt with by the committees. The Act makes generous provision for objections by interested parties upon specified grounds at public hearings before the Commission or a committee as the case may be. Public notice of applications is provided for.

REVIEW OF CERTAIN LICENCES

70. The Commission may at any time, on the application of an inspector appointed under the Act to ensure compliance with its provisions, review the accommodation, services, and facilities provided in premises licensed as a hotel, tourist house, or tavern. On any such review the Commission may order the licensee to rebuild or alter the premises or provide additional facilities. Before making any such review the Commission must give public notice of its intention and also notify the licensee. The review is to be conducted at a public sitting and the Commission must hear all interested parties.

CANCELLATION OR SUSPENSION OF LICENCES AFTER REVIEW

71. If a licensee does not comply with the directions of the Commission made after a review, it may cancel or suspend the licence or grant a temporary licence. Before doing so it must afford the licensee, on not less than 10 days' notice, an opportunity to show cause why the licence should not be so cancelled or suspended.

The committee may in like manner review such licences and make similar orders to the Commission except an order to rebuild. It has like powers to cancel or suspend a licence after review. The committee may also, after notice and a hearing, suspend certain licences for non-compliance with public health or fire precaution requirements.

CANCELLATION OR SUSPENSION OF OTHER LICENCES

72. A committee, on the application of a member of the Police, may also cancel or suspend, for any period not exceeding 12 months, any licence other than a hotel, tourist-house or tavern-premises licence on certain specified grounds, after giving notice to and hearing the licensee.

APPEALS

73. *On Questions of Law:* Any party to proceedings before the Commission or any committee who is dissatisfied with any determination on a point of law may appeal to the Supreme Court by way of case stated.

APPEALS AGAINST DECISIONS OF LICENSING COMMITTEES

74. (i) *Direct to Supreme Court:* An appeal against decisions of a committee lies direct to the Supreme Court in certain cases. These include a refusal to grant certain licences on the ground of character and reputation of the applicant; and a refusal to renew, or the cancellation or suspension of, a licence on the grounds (*inter alia*) that the licensee has failed to conduct the premises in a proper manner, has been repeatedly intoxicated, has committed any offence against the Act or breach of his licence, has been convicted of any offence under the Health Acts, and has failed to fulfil his responsibilities under certain provisions of the Act (which include furnishing the premises to an adequate standard, the provision of adequate facilities for accommodation and meals, and related matters). On the hearing of any such appeal, the Supreme Court may in its discretion rehear the whole or any part of the evidence and receive further evidence either orally or by affidavit. The Court may confirm, modify, or reverse the decision appealed against. It has no power to refer the matter back to the committee.

(ii) *Appeal to Commission:* Any party to proceedings before a committee who is dissatisfied with any decision (other than decisions referred to in the preceding paragraph (i)) may appeal to the Commission against such decision within 14 days.

On the hearing of the appeal, the Commission has the same powers as the Supreme Court on an appeal from the Commission. These are set out in paragraph 75 below. In addition the Commission may, instead of confirming, modifying, or reversing the decision, refer the matter back to the committee for further consideration.

APPEALS AGAINST DECISIONS OF THE COMMISSION

75. An appeal lies to the Supreme Court against various decisions of the Commission among which are the following:

(i) Standards imposed on the conversion of hotel to tavern premises and vice versa; a direction to rebuild, alter, or repair premises; and a decision on appeal from a committee as to additions, repairs, and associated matters in any case where it will be necessary to expend £5,000 or more to comply with such decision.

(ii) The cancellation or suspension of a licence after review whether by the Commission direct or on appeal from a committee.

(iii) The refusal or cancellation of a licence by reason of a failure to make full disclosure of the true owner on an application for, or the grant of, a new licence or the subsequent revocation of the grant of an application for failure to comply with its requirements.

(iv) The refusal to direct that a poll be taken for the purpose of ascertaining whether a majority of the electors in an area desire that a licence should not be granted or whether, if such licence is granted, it should be issued to a local trust.

(v) The refusal to grant an application for a special hotel-premises licence or a hotel-premises licence in place of a tavern-premises licence and vice versa.

(vi) The grant of an application for a new licence in which case any unsuccessful applicant may appeal.

(vii) The giving of notice of its intention to invite applications for a tavern-premises licence or a grant of such a licence in place of a hotel-premises licence in which case the holder of a hotel-premises licence in the locality may in certain circumstances appeal.

On hearing such an appeal the Supreme Court may reverse the Commission's order or refer it back for further consideration.

(viii) The revocation or suspension of a club charter.

PROCEDURE AND POWERS OF SUPREME COURT ON APPEALS FROM COMMISSION

76. On hearing any appeal the Court may confirm, modify, or reverse the decision appealed against. It has no power to refer the matter back except in the one case referred to in subparagraph (vii) above. The Commission may, if it thinks fit, and shall, if the Court so directs, file with the Court a report setting out the considerations to which it had regard in coming to the decision under appeal, including any material indicating the effect that the decision might have on the general administration of the Act, and any other matters relevant to the decision or to the general administration of the Act to which it wishes to draw the attention of the Court. A copy of any such report is to be served on every party to the appeal who is entitled to be heard and to tender evidence on any matter referred to in the report. The Court is required to have regard to any such report whether or not matters referred to in it would otherwise be admissible in evidence in a court of law. The

Court may, in its discretion, rehear the whole or any part of the evidence and may hear further evidence on questions of fact either orally or on affidavit.

IS THE SUPREME COURT A SUITABLE APPEAL FORUM?

77. The foregoing summary of appeal rights is not exhaustive but is sufficient to show their wide scope. Few would suggest that there should be no right of appeal against the Commission's decisions, and clearly decisions founded on the character or reputation of a licensee should go to the Supreme Court which is pre-eminently fitted to deal with such matters. But can this be said for most of the other appeals which will come before it? Suppose that the holder of a hotel-premises licence applies to the Commission for the grant to him of a tavern-premises licence in place of his hotel licence. In determining whether to grant such an application, the Commission must have regard to the need "to secure the provision of reasonable and adequate facilities so that those who wish to do so may drink in reasonable comfort and so that the demand for facilities for the purchase and consumption of liquor is met but not stimulated". To this end it shall prescribe the standards (if any) to be complied with. If the expenditure incurred in complying with the Commission's requirements exceeds £5,000 an applicant may appeal to the Supreme Court against the Commission's decision prescribing the standards to be complied with. How is a Judge of the Supreme Court to determine such an appeal? He will know little or nothing of the detailed work of the Commission. He may have before him a report from the Commission and if so he must have regard to it. But it will be extremely difficult, if not impossible, for the Commission to condense its accumulated knowledge and experience into a report which cannot be too lengthy. Even with such a report it will surely be difficult for a Judge to determine whether in any given case the Commission has called for, say, too much seating or that it is too elaborate or that in the circumstances none need be provided at all. To adequately decide the matter he would need to know not only the general policy of the Commission as to standards but be familiar with decisions in comparable cases. The same can be said of almost all other decisions against which an appeal lies to the Supreme Court. There must be a strong case for channelling all such appeals to a Judge of the proposed Administrative Court, who unlike a Judge of the Supreme Court, could specialise in this jurisdiction. Moreover there appears to be no compelling reason why all appeals from decisions of licensing committees (other than those affecting character) should not go direct to the Administrative Court instead of to the Commission as at present.

4

Trade

RESTRICTIVE TRADE PRACTICES

TRADE PRACTICES AND PRICES COMMISSION

78. The Trade Practices and Prices Commission was set up by the Trade Practices Act 1958 and consists of a Chairman and one or more members. The persons who at the time of the passing of the Act were members of the Price Tribunal became members of the Commission, and the then President of the Tribunal became Chairman of the Commission. Additional members may be appointed to the Commission from time to time and hold office during the pleasure of the Governor-General. Any person so appointed shall, during his appointment, be a member of the Price Tribunal. No qualifications are required for appointment to either the Price Tribunal or the Trade Practices Commission.

FUNCTIONS OF COMMISSION

79. The principal functions of the Commission are to prohibit or control restrictive trade practices which it finds to be contrary to the public interest and to exercise the powers and functions of the Price Tribunal. This latter power is conferred without limiting the authority of the Price Tribunal. As the same persons comprise the membership of the two bodies and the Commission is empowered to exercise all the powers and functions of the Tribunal, considerable difficulty must be experienced by members in ascertaining whether they are acting as the Commission or as the Tribunal when exercising the powers and functions conferred by the Control of Prices Act 1947! They may alternate as they see fit. In practice the members appear to abandon the mantle of the Commission and adopt the cloak of the Tribunal when engaging in price control activities. It may also be thought somewhat paradoxical that a body charged on the one hand with abolishing restrictive trade practices and thereby stimulating competition is also empowered to impose what amounts to a uniform price structure in certain sectors of the economy. Businessmen may one day appear before the members of the Commission to have their self-imposed collective price control struck down in the name of free competition,

and the next day in respect of different commodities have competition virtually eliminated by the imposition of Government price control. In these circumstances they may be pardoned if they feel the same body is blowing hot and cold. There is surely a strong case for having these two somewhat conflicting jurisdictions vested in separate bodies with different membership if only for the added confidence it would give those who appear before them.

80. The proceedings of the Commission are in fact by way of a public inquiry, but since the amending Act of 1961 more nearly resemble an action between the Examiner of Trade Practices and the parties to the trade practice under review. At any inquiry the Commission has a wide discretion as to the admissibility of evidence and is now empowered to make rules of procedure.

81. The privative clause, in the usual form, protects the proceedings and decisions of the Commission subject, however, to a right of appeal against its orders.

APPEAL

82. Appeal lies to the Trade Practices Appeal Authority who is required to be a barrister or solicitor of not less than seven years' practice, and who holds office at the pleasure of the Governor-General. Since the Act came into force this office has been held by the Judge of the Compensation Court, who also holds office as Motor Spirits Licensing Appeal Authority. The function of the Appeal Authority is to sit as a judicial authority for the determination of appeals. The provisions of the Act as to evidence and procedure at the hearing, and the power to confirm, modify, reverse, or refer back are virtually identical with those of the Cinematograph Films Appeal Authority. There is a privative clause in the usual form.

CASE STATED

83. Both the Chairman of the Commission and the Appeal Authority are empowered to state a case for the opinion of the Court of Appeal on any question of law arising in any matter before them.

PRICE CONTROL

PRICE TRIBUNAL

84. The Price Tribunal as constituted by the Control of Prices Act 1947 is to consist of a President, one or more ordinary members, and one or more associate members appointed as such. The members of the Tribunal are appointed by the Governor-General, on the recommendation of the Minister of Industries and Commerce, and

hold office during the pleasure of the Governor-General. By direction of the Minister, associate members are to sit as members at any sitting of the Tribunal. Any such direction may be of general application, or limited in its application to any specific sitting or sittings of the Tribunal, or to sittings where any specified class is dealt with. In view of the provisions of the Trade Practices Act 1958 empowering the Trade Practices and Prices Commission to exercise all the powers and functions of the Price Tribunal, any ministerial direction for the attendance of associate members could be frustrated by the Tribunal electing to sit as the Trade Practices Commission with which associate members of the Tribunal could not sit. Although the possibility of such a situation arising may be remote it would be preferable to eliminate all possibility of such an occurrence by amending the legislation.

85. The principal function of the Price Tribunal is to fix prices for those goods and services from time to time subject to price control. Prices may be fixed by price orders or by way of special approvals. With the consent of the Minister the Tribunal may delegate to the Secretary of Industries and Commerce or any other person approved by the Minister any of its powers under the Act including its powers to make special approvals but excluding its powers to make price orders. An appeal lies against special approvals made by a delegate of the Tribunal. Every sitting of the Tribunal must be held in public unless it orders otherwise in respect of any case or class of cases, and it is empowered to settle its own procedure. In practice it almost always sits in private. Although the function of the Tribunal in making price orders is legislative in character, the Supreme Court, in *F. E. Jackson and Co. Ltd.* v. *Price Tribunal*,[1] ruled that parties affected are entitled to be heard before an order is made.

NO RIGHT OF APPEAL

86. Although business interests may be very adversely affected by price orders or special approvals no right of appeal is given those aggrieved by the Tribunal's decision. It was estimated in the *Master Grocers'* case before the Trade Practices Commission that one-half of a grocer's turnover came from price-controlled goods. In this business alone the turnover involved must amount to some millions of pounds. Although a party affected by a price order may apply for a rehearing under a provision which empowers the Tribunal at any time to amend the prices fixed, this is no substitute for review by a higher appeal authority. If an appeal is desirable in the case of orders made by the Trade Practices Commission in

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[1] [1950] N.Z.L.R. 180.

respect of restrictive trade practices, a right of appeal appears equally desirable and feasible in respect of price orders. Nor need the right of appeal be one sided; there is much to be said for the Secretary of Industries and Commerce as guardian of the public interest also having a right of appeal. Pending the hearing of the appeal the price order in question could be left in force unless the Tribunal ordered otherwise.

TARIFF AND DEVELOPMENT BOARD

87. This Board was established by the Tariff and Development Board Act 1961, the Act coming into force on 1 June 1962. The Board consists of such number of members, being not less than four nor more than six, as the Governor-General thinks fit to appoint. Board members hold office for three years and may be reappointed. The Board may meet in public or private and is to give such notice as the Chairman thinks fit of any public meeting to persons likely to be affected. The Board has the powers of a commission of inquiry and may regulate its own procedure. It may, at its discretion, rehear any matter that has been heard and determined by it.

FUNCTIONS OF BOARD

88. The principal functions of the Board are, when requested by the Minister of Customs, the Minister of Industries and Commerce, or the Minister of Overseas Trade, to inquire into, and report to the Minister on, a number of matters, with such recommendations as it thinks fit. These matters include customs duties, the general effect of the operation of the tariff, the provision of assistance or protection to New Zealand industry, and the development of overseas trade. Any matter relating to the licensing of imports, including any appeal against a decision to decline, in whole or in part, any application for an import licence, may also be referred to the Board.

IMPORT LICENCES

89. A notable feature of the Board's functions is its power, if called upon, to make recommendations to the Minister of Customs on an appeal (presumably to the Minister) against a decision declining in whole or in part an application for an import licence. While the function of the Board is to recommend only, some elaboration of the procedure to be followed by the Board, should it be called upon to act as an informal appeal tribunal, seems desirable. Parties appearing before the Board may, in the absence

of regulations clarifying the position, consider themselves entitled to a comparative hearing when other applications have been granted and their's declined. In an area as sensitive as import control, it is difficult for an applicant to pursue a worth-while appeal and for any Board to come to a rational conclusion unless some guide lines are laid down. Without these, an applicant may find any hearing afforded him a hollow privilege and an unsatisfactory substitute for more direct representation. If any right of appeal is conferred it should be one which enables an applicant fairly to present his case and to know the case against him; if this cannot be done the limitations to any apparent right conferred should be made clear at the outset, and the proceedings designated as something other than an appeal.

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Health and Social Security

MEDICAL ADVERTISEMENTS

90. The Medical Advertisements Board was established by the Medical Advertisements Act 1942. The Board consists of the Director-General of Health, who is Chairman, an analyst under the Sale of Food and Drugs Act, a medical practitioner, and two other persons who, along with the other members, are appointed by the Governor-General and hold office during his pleasure. The Board is empowered to call on the proprietor of any drug, cosmetic, or other article to which any medical advertisement relates, to prove to the satisfaction of the Board any claim or statement contained in the advertisement, or which in the Board's opinion is implied in the advertisement. The notice from the Board is to set out the claim or statement which it requires to be proved. Any person so called upon has the right to appear before the Board and bring evidence in support of the claim. If the Board decides that the claim has not been proved to its satisfaction the advertiser must cease advertising his claim and may not renew it without the prior consent of the Board.

NO RIGHT OF APPEAL

91. Advertisers who may have been erroneously found by the Board to be disseminating false claims have no right of redress. In America the Federal Trade Commission has power to prevent "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce", which section 5 of the Federal Trade Commission Act 1914 declares to be unlawful. The Federal Trade Commission exercises powers broadly analogous with those of the Trade Practices and Prices Commission in New Zealand, with the added jurisdiction over false or unfair advertising. Medical advertisements are frequently before the Federal Trade Commission. Any advertiser ordered by the Commission to cease and desist from misleading advertising is entitled to obtain a review of the Commission's order by the United States Federal Court of Appeals. On such review the findings of the Commission as to facts, if supported by substantial evidence, are conclusive. Since the Medical Advertisement Board is likely to be as fallible as other administrative tribunals a right of appeal is warranted. It could well lie

to a Judge of the proposed Administrative Court, who if necessary could sit with qualified associates.

HEALTH GENERALLY

92. Section 124 of the Health Act 1956 provides for the constitution of *ad hoc* boards of appeal to consist of a Magistrate as Chairman and two assessors appointed by the Minister. These appeal boards are given jurisdiction to hear appeals against the decision of a local authority or medical officer of health laying down restrictions on the carrying on of an offensive trade, and against restrictions on the establishment or extension of saleyards. While appeals of this kind could doubtless be heard by a Judge of the proposed Administrative Court the knowledge of local conditions of a Magistrate and assessors residing in a particular district may assist in the better administration of such appeals. The independence of the boards is facilitated by a prohibition in the Act against the appointment of members or officers of the local authority, Board of Health, or Department of Health as assessors. An Appeal Board has full power to allow, modify, or dismiss an appeal, or to make such new determination or conditions as it thinks fit. The boards have the powers of a commission of inquiry, are free to regulate their own procedure, and their decisions are final.

WAR PENSIONS

93. The War Pensions Act 1954 empowers the Minister of Defence to appoint such number of war pensions boards as he thinks fit. A board is to consist of either three or four members appointed by the Minister and holding office during his pleasure. Not less than one member of each board is to be a registered medical practitioner and one member is to represent the New Zealand Returned Services Association (Inc.). Certain statutory presumptions operate in favour of a claimant's eligibility for a war pension, and the Act specifically provides that, in determining a claim for a pension:

> a War Pensions Board, or an Appeal Board, as the case may be, shall decide in accordance with substantial justice, and the merits of the case, and shall not be bound by any technicalities or legal forms or rules of evidence.

Both war pensions boards and appeal boards are deemed to be commissions of inquiry.

APPEAL

94. A right of appeal against certain decisions of a board lies to a war pensions appeal board. The Minister may appoint one or more such boards, consisting of three members who hold office during his pleasure. Two members of each appeal board must be medical practitioners, one of whom is to be appointed on the nomination of the New Zealand Returned Services Association (Inc.). The chairman of the board is appointed by the Minister. The appeal board has all the powers of the pensions board in determining an appeal, and its decision is final and conclusive. A claimant may, however, obtain a further review of his application if he satisfies the Secretary of War Pensions that it is in the interests of justice that it should be reconsidered.

PROCEDURE

95. The War Pensions Regulations 1956 contain some procedural provisions concerning appeals. The Secretary of War Pensions is required to submit to the appeal board all relevant departmental records relating to the appellant. If in practice the contents of these records are not disclosed to the appellant, then it seems desirable that the rules should be amended to ensure that this is done, so that the appellant may know the case he has to meet. If any material evidence that was not submitted to the board is submitted by the appellant in the appeal proceedings, the appeal board may refer the matter back to the board for further consideration.

LIMITED RIGHTS OF APPEAL

96. Although the war pensions boards have a number of wide discretionary powers which are not subject to appeal these are exercised against the background of statutory presumptions which strongly support a claimant's application, and the possibility of arbitrary adverse decisions is correspondingly reduced. Moreover a right of appeal to a Magistrate is available to any pensioner who has his pension reduced or terminated on account of a finding by the board that he is of bad character or guilty of gross misconduct dishonouring him in the public estimation. If, after investigation, the Magistrate recommends restoring the pension, the board must act accordingly.

SOCIAL SECURITY

97. The Social Security Commission is constituted under the Social Security Act 1938. It is expressed to be a permanent Commission whose members, not more than three in number, are the

principal officers of the Department. The Commission appears to be a device for vesting the administration of the Act in three top officials instead of one. In the exercise of its power under the Act the Commission is subject to the "general direction and control" of the Minister of Social Security, in whom is vested responsibility for the administration of the Act.

POWERS OF COMMISSION

98. For the purposes of investigating any claim for a benefit or otherwise carrying on its functions, the Commission has the powers of a commission of inquiry. Every claim for a benefit must be investigated by the Commission or by an officer of the Social Security Department. All benefits granted under Part II of the Act must be granted by the Commission. The Act appears to contemplate informal investigation by the Commission or its officers and is silent as to any form of procedure to be followed by the Commission.

RIGHT TO A HEARING?

99. This raises the question whether an applicant for a benefit has any "rights" which entitle him, as a matter of law, to a fair hearing before his claim is disallowed. Some benefits are payable as of right but subject to the qualification that the applicant, in the opinion of the Commission, "is of good moral character and sober habits". Other benefits may be granted if the Commission considers that the claimant meets certain statutory qualifications and then up to an amount which the Commission thinks appropriate. In such a situation the answer may be that, in respect to certain benefits, a claimant has a sufficiently vested statutory right as to entitle him to a fair hearing, but that in others the area of discretion is so wide that the function of the Commission is purely administrative and the claimant must accept the finding of the Commission however it is arrived at.

100. If the New Zealand conception of social security is that the state is under a positive duty to provide appropriate benefits, within the framework of the Act, wherever a need is shown to exist, then it can be strongly argued that a claimant for a benefit is not a mere supplicant for charitable support. On the contrary, he would appear to be entitled to a fair and reasonable adjudication upon his eligibility for a benefit appropriate to his circumstances. The correlative to this proposition is that the Commission is under a duty to grant a benefit if the claimant is so entitled. In so far as the Commission must be satisfied of certain conditions such as the good moral character and sobriety of a claimant, whether reasonable steps to obtain work have been taken, whether the maximum benefit

is necessary for the maintenance of the beneficiary, and so on, the claimant ought to be afforded the opportunity of a fair hearing. If, as may be the case, this would impede the prompt handling of the large number of applications which the Commission must dispose of in the course of a year, the obvious solution is to afford a right of appeal.

101. The appeal authority should have jurisdiction over the more important discretionary powers of the Commission and in particular power to review adverse findings on the kind of qualifying conditions referred to above. In Appendix B to this report the major discretionary powers of the Commission are set out. The General Division of the proposed Administrative Court would be an appropriate appeal authority.

102. As the Social Security Act stands at present, a claimant whose application is rejected by the Commission has virtually no means of obtaining an effective review. While an appeal could no doubt be addressed to the Minister in charge of the Department his decision is likely to be based on the same material as the Commission acted upon and will naturally tend to support the Commission.[1] What is needed is an independent review with full disclosure to the claimant of the evidence in the possession of the Commission and its reasons for rejecting the application. There is no reason for anticipating an unmanageable spate of appeals. The Commission is known to take a positive if not a beneficent attitude towards its administrative duties under the Act, and the number of appeals in any year would probably not be great. But this is not a reason for denying an appeal to the relatively few aggrieved with the Commission's decisions. The Commission, after all, must in the vast majority of cases rely on the information placed before it by its subordinate officers; it is too much to expect that this information will always be reliable and that injustice will never occur.

LIMITED RIGHT OF APPEAL

103. A right of appeal is given to applicants for, or beneficiaries of, invalids' or miners' benefits which are refused or terminated on medical grounds. Appeal lies in each case to a Board of three medical practitioners appointed for the purpose by the Commission, and the decision of the Board is binding on the Commission. An appeal also lies to the Commission against decisions of registrars exercising delegated functions of the Commission. While this latter right of appeal will enable the Commission to ensure that

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[1] He can now, of course, complain to the Ombudsman. This does not appear to be a satisfactory long-term solution. The Ombudsman has power to recommend, but not to make a binding decision.

its general policy is uniformly applied it will be of little assistance in correcting errors of fact unless it carries out a full and independent investigation of its own.

SPECIAL TRIBUNAL

104. Under Part III of the Act, which is concerned with medical, hospital, and related benefits, the Minister of Health is empowered to appoint a special tribunal to investigate and recommend whether contracts entered into with medical practitioners, pharmaceutical chemists, midwives, and others should be terminated. Every such tribunal consists of a President who must be a Judge of the Supreme Court or a Magistrate and not less than two other persons who must be members of the same profession as the person to whose contract the investigation relates. Here, again, a Judge of the proposed Administrative Court could officiate as President.

6

Land

LAND VALUATION

105. The Land Valuation Court was set up under the Land Valuation Court Act 1948 as a Court of Record. It comprises a Judge who must be a barrister or solicitor of not less than seven years' standing; he holds office during good behaviour to the age of 72. The two other members are appointed for a term of five years and are eligible for reappointment. No qualifications are called for by the Act. The Governor-General is empowered to make rules regulating the practice and procedure of the Court; detailed procedural rules are contained in the Land Valuation Court Rules made in 1953 and amended in 1959. Subject to these rules the Court determines its own procedure, and it may admit any evidence which it considers may assist it to deal effectively with the matters before it, whether or not such evidence would be otherwise admissible in a court of law.

FUNCTIONS OF THE COURT

106. It is not only the duty of the Court to sit as a judicial body for the determination of appeals and other matters formally submitted to it, but it may of its own motion issue general directions on questions of procedure to be observed by the land valuation committees in the exercise of their powers and functions under the Act. Also it may at any time exercise any power or function of a land valuation committee. So far as can be ascertained this is a unique provision in that no other appeal authority appears to have power to prescribe the procedure to be followed by the lower tribunal. While appeal authorities may well let fall observations in particular cases before them as to the unsatisfactory procedure adopted by the lower tribunal it is surprising that no other appeal authority has been given power to issue general directions and so in effect prescribe rules of procedure to be followed by the tribunal below. Only good could come from the exercise of such a power, since the appeal authority is in the most advantageous position to see how defects in procedure have led to unjust or erroneous decisions which could have been avoided.

REFERENCE TO SUPREME COURT

107. A decision of a majority (including the Judge) of the members present shall be the decision of the Court. If the members present (a quorum being two) are equally divided the decision of the Judge is the decision of the Court. If the Judge is unable to agree with the decision of the other two members of the Court, the question is to be referred to the Supreme Court which for this purpose shall have all the powers of the Land Valuation Court. The decision of the Supreme Court is final.

CASE STATED

108. Subject to the preceding provision the decision of the Land Valuation Court is expressed to be final and, except on the ground of lack of jurisdiction, not subject to review by any court. The Judge of the Court may himself, or on the application of any party, state a case for the opinion of the Court of Appeal on any question of law arising in the proceedings.

LAND VALUATION COMMITTEES

109. The Governor-General in Council may establish as many land valuation committees as are thought necessary for the purposes of the Act. Every such committee is to consist of such number of persons up to three as the Governor-General decides, and members hold office during the pleasure of the Governor-General. In addition, each local authority may appoint a member to a committee which exercises its functions in the district of the local authority. Each committee has the power of a commission of inquiry and, subject to any rules and regulations under the Act or general directions from the Land Valuation Court, may regulate its own procedure. Every person having an interest in any matter before a committee is entitled to be heard personally or by his counsel or agent and to produce evidence and cross-examine witnesses. The committee of its own motion, or on the application of parties before it, may apply to the Land Valuation Court for directions, and the Court may make such order or give such directions as it thinks fit after hearing the parties.

APPEAL

110. Any person affected by a final order of a committee may appeal to the Land Valuation Court or, if an appeal is not lodged within the stipulated time, the Court may, before the order is sealed, itself direct that the order be reviewed before the Court. Upon any such appeal or review, which is to be by way of rehearing, the Court may confirm, discharge, vary, or refer back the order,

and generally make such order as it considers just and equitable in the circumstances.

TAKING OF LAND

111. Under section 22 of the Public Works Act 1928 (as amended in 1963), whenever any lands are required for any public work, the Minister of Lands, in the case of any Government work, and the local authority, in the case of local works, must (among other things) give public notice of the proposed works and of the lands required to be taken. A copy of such notice must be served on the owners and occupiers of the land in question and any other persons having an interest in the land. The notice calls on all persons affected by the proposed taking to lodge any objections to the execution of the works or the takings of the lands within 40 days.

112. If an objection is lodged the Minister of Works is required to appoint a time and place at which the objector may appear before the Minister, or some person appointed by him, and support the objection by such evidence as the objector thinks fit. A local authority is likewise required to afford a hearing. If after due consideration of all objections "the Minister or the local authority . . . is of opinion that it is expedient that the proposed works should be executed, and that no private injury will be done thereby for which due compensation is not provided" the land may be taken.

113. No procedure for regulating the hearing is prescribed by the Act, and indeed the provisions generally are remarkable for their brevity and lack of any great respect for the rights of the landowner. The conclusion is irresistible that the Land Valuation Court and its predecessor, the Compensation Court, must have been consistently fair in their awards of compensation. A landowner has the right to have his claim for compensation (but not his objection to the taking of the land) referred to the Land Valuation Court which has power to make an award in terms of the Act. Since only a very small minority of claims ever reach the Court, it follows that the Government and local authorities respectively have treated reasonably with landowners in reaching agreement on the amount of compensation. As a result, a problem which was ever in the minds of the Franks Committee and to which a substantial part of their report is devoted is of no real significance in New Zealand, despite considerable activity by both Government and local authorities in taking land for various public works. Professor Bernard Schwartz of New York, in evidence before the Franks Committee, testified that in America the problem is a minor one, again because owners are awarded a fair compensation.[1]

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[1] Minutes of Evidence, Twenty-second Day, par. 5256 at 1040.

LAND SETTLEMENT

LAND SETTLEMENT BOARD

114. This Board is established by the Land Act 1948. It comprises the Minister of Lands, eight Government officials, a nominee of the New Zealand Returned Services Association (Inc.), and not more than two other persons appointed by the Governor-General and holding office during his pleasure. The New Zealand Returned Services Association's representative is a member of the Board only for purposes connected with the settlement of servicemen or discharged servicemen.

115. The duties of the Board are:

> To carry out the provisions of the Act for the administration, management, development, alienation, settlement, protection, and care of Crown Land; and to undertake, control and carry out all negotiations for the purchase of land by the Crown under this Act, and the performance and completion of all contracts of purchase so entered into by the Crown.

In the exercise of its functions the Board must have regard to any representations that may be made by the Minister and shall give effect to any decision of the Government conveyed to it in writing by the Minister.

LAND SETTLEMENT COMMITTEES

116. The Act also provides, for the purpose of assisting in the administration of the Act, for the appointment by the Board of one or more land settlement committees for each land district. Such committees are to consist of three members, one of whom must be the Commissioner of Crown Land for the district, as Chairman. Members of these committees may be appointed for a term not exceeding three years and may be reappointed. The Act also provides for the appointment, as an associate member of a committee, of any person possessing expert knowledge which could be useful to it.

DELEGATION OF POWERS

117. The Board may delegate any of its powers to any committee of the Board, to any land settlement committee, or to any officer or officers of the Lands Department.

INQUIRIES BY THE BOARD

118.

> For the purpose of hearing and determining any matter, question, doubt, or difference in relation to any matter within the Board's jurisdiction or for the purpose of arriving at a decision

upon any application submitted to it or making any inquiry into breaches of this Act.

the Board may summon witnesses and hold an inquiry.

REHEARING

119. Any person aggrieved by a decision of the Board is entitled to apply to the Board, within one month of being notified of the decision, for a rehearing. The Board may grant a rehearing if it thinks that justice requires it and on the rehearing may reverse, alter, modify, or confirm its previous decision.

APPEAL TO THE SUPREME COURT

120. An appeal lies to the Supreme Court by any person who considers himself aggrieved by any decision of the Board. This right of appeal does not extend to decisions in respect of the purchase price, rental value, or rent of any land, or in respect of any claim for compensation against which there is a right of appeal to the Land Valuation Court. The appeal is in the form of a case agreed upon by the Board and the appellant or, if they cannot agree, the Court is to hear the appeal without a case stated, and in any case may receive evidence either orally or by affidavit or by both these means. If it thinks fit the Court may, instead of deciding a question of fact itself, order the question to be tried by a jury. After the hearing the Court is to give its decision, and the Board must reverse, alter, modify, or confirm its own decision accordingly. There is no power to refer the matter back to the Board with appropriate directions. This appears to be a weakness which warrants correction.

121. The functions of the Land Settlement Board are largely administrative in character. It would appear that the Supreme Court was given jurisdiction to hear appeals from the Board's decisions in the absence of any more appropriate authority. In view of the air of caution and sometimes self-confessed sense of inadequacy with which the Supreme Court has approached the determination of appeals from administrative bodies, the proposed Administrative Court would appear to be a more satisfactory appellate body.

QUESTION OF LAW

122. The Board may itself or at the instance of a party, in any case of doubt upon a question of law, submit a case to a Judge or Judges of the Supreme Court for their opinion, which when given is binding on the Board. Even were the proposed Administrative Court to take over the present appellate functions of the

Supreme Court it may be desirable that this power of direct reference of a question of law to the Supreme Court should remain.

PRIVATIVE CLAUSE

123. The privative clause in section 173 of the Act is unwarrantably comprehensive and should be substantially modified, particularly in relation to the conviction of any offender against the Land Act or any other Act relating to the administration of Crown land.

LAND SETTLEMENT PROMOTION

124. The Land Settlement Promotion Act 1952 empowers the Minister of Lands to take farm land in excess of the need of the owner (who is entitled to retain two economic farms) and of his children. An aggrieved owner has a right of appeal to the Land Valuation Court both against the taking of his land and the decision of the Minister on the owner's claim to retain land for himself and his children. Any dispute as to the compensation payable for land taken also goes to the Land Valuation Court. In addition the consent of the Land Valuation Court is required to the acquisition of land, and consent will be refused if the proposed transaction will result in undue aggregation as defined by the Act. The effect of the appeal rights is to give the Land Valuation Court, on an objection before it, power to override all the Minister's discretionary powers.

7

Local Government

LOCAL GOVERNMENT REORGANISATION

LOCAL GOVERNMENT COMMISSION

125. The present Commission was set up by the Local Government Commission Act 1961 and consists of three members appointed by the Governor-General in Council. The Chairman of the Commission is a barrister and solicitor of the Supreme Court, and the other two members must have a special knowledge of local government. The term of office of members is not to exceed five years, but they may be reappointed. Two members constitute a quorum. The Commission is deemed to be a commission of inquiry and may regulate its procedure as it thinks fit.

FUNCTIONS OF COMMISSION

126. The principal functions of the Commission are to carry out all investigations, prepare all schemes, and make all the recommendations and reports necessary for the purpose of ensuring that the system of local government in any locality is such as best provides for the needs and continued development of that locality; and that local authorities have such boundaries, functions, and powers as will enable them to provide essential or desirable local government services and facilities in the most effective and economical way. In performing its functions the Commission may from time to time review the functions and boundaries of local authorities, and generally review and report to the Minister upon local government matters. For the purpose of any review the Commission may hold a public inquiry at which all persons and bodies having an interest may attend and give evidence. If, after the hearing, the Commission prepares a provisional reorganisation scheme, it must give public notice thereof. Any person or body interested may object to the scheme, and their objections must be considered by the Commission for which purpose it may if it thinks fit hold a further public inquiry. After all objections to a provisional scheme have been disposed of the Commission may finally approve the scheme.

APPEALS

127. Certain specified persons and bodies may appeal from the whole or any part of any decision of the Commission upon its final

approval of a scheme. Those qualified to appeal are: any local authority affected by the scheme; any person having statutory authority to make decisions or recommendations in respect to the union, merger, etc., of any district to which the scheme relates; and the Minister of Internal Affairs in certain circumstances.

APPEAL AUTHORITY

128. Appeal lies to the Local Government Appeal Authority who must be a barrister and solicitor of the Supreme Court of not less than seven years' practice. He holds office for a term not exceeding five years and may be reappointed. The functions of the Appeal Authority are to sit as a judicial authority to determine appeals from decisions of the Commission. He can admit any evidence that may in his opinion assist him to deal effectively with the appeal before him, whether or not that evidence would be otherwise admissible in a court of law. He is deemed to have the powers of a commission of inquiry and may regulate his own procedure. Every sitting of the Appeal Authority must be in public. After hearing the appeal the Authority may make an order either allowing the appeal in whole or in part or confirming the scheme, subject to amendment, or dismissing the appeal. There is power to refer the matter back to the Commission. The privative clause is in the usual form.

129. This is another case where the Act recognises special qualifications in the membership of the lower tribunal but vests full powers of review on appeal in a single judicial officer. The office of Appeal Authority is currently held by the Judge of the Land Valuation Court, who also fulfils other appellate duties.

TOWN AND COUNTRY PLANNING

TOWN AND COUNTRY APPEAL BOARD

130. The Town and Country Appeal Board has extensive jurisdiction under the Town and Country Planning Act 1953 to hear and determine appeals arising from objections to the provisions of either regional planning or district schemes. Thus public bodies and local authorities have a right to appeal to the Board against a regional planning scheme so far as it conflicts with any operative scheme. If any regional planning authority or local authority refuses to approve any regional planning scheme or any part of it, the planning authority or the local authority, as the case may be, may request the Appeal Board to determine whether any provision to which objection is taken is a desirable one. The Board's decision on the matter is binding on the parties. Where a local authority

has wholly or partly disallowed any objection to a district scheme which has not become operative, or to any variation of a scheme, the objector may appeal to the Appeal Board. If, before any district scheme becomes operative, the Council has refused to issue to the owner or occupier of any land a permit for the erection of or alteration to a building or the formation of any road or subdivision of any land, the owner or occupier may also appeal to the Appeal Board.

CONSTITUTION AND POWERS OF APPEAL BOARD

131. The Appeal Board consists of the following: a barrister and solicitor of the Supreme Court, who is Chairman; a nominee of the Municipal Association of New Zealand; a nominee of the New Zealand Counties Association; and one other person. Every member is appointed by the Governor-General on the recommendation of the Minister of Works for three years and may be reappointed. The Board has the powers of a commission of inquiry, it may regulate its own procedure, and it has power to award costs.

132. The Town and Country Planning Regulations 1960 prescribe the form of appeal and require the grounds to be fully stated. The local authority, the Commissioner and District Commissioner of Works, and the regional planning authority (if any) must be served with a copy, and the respondent is required to file and serve a written reply to the appeal. The regulations empower the Appeal Board, in its discretion, to do anything it considers helpful towards ascertaining the merits of the appeal, including rehearing the whole or part of the evidence, calling for additional evidence, and inspecting any land or building affected.

133. The Board itself may call in evidence any person who is experienced in regional or district planning. At the hearing of an appeal the Minister or any party or any public body or local authority or regional planning authority that is affected may be represented by counsel or otherwise, and may call evidence. The Board may then vary, cancel, or reverse the scheme, decision, or determination before it, or confirm it either absolutely or subject to such conditions or modifications as it deems just. Its decision is declared to be final and conclusive.

REVIEW BY THE BOARD

134. If, after any decision has been given by the Board, new and important evidence becomes available, or there has been a change of circumstances which might have affected the decision, any party may apply to the Board for a review of the decision. In any such case the Board, after notice to the other parties con-

cerned and after hearing such evidence as it thinks fit, must determine whether, and if so, on what conditions, the decision should be reviewed.

135. This Board is actively engaged in hearing appeals, customarily gives written reasons for its decisions, and is highly regarded by the legal profession. The Chairman could well be a Judge of the proposed Administrative Court and the three additional members associates of the Court.

SPECIAL BOARD

136. In 1963 an amendment to the Act provided for the establishment – from time to time – of an additional board to be known as the Special Town and Country Planning Appeal Board. If the Deputy-Chairman of the Main Board is a barrister or solicitor he may, without relinquishing his office with the Main Board, be appointed Chairman of the Special Board. Any other member of either Board may, on the written direction of the Chairman of the Main Board, sit as a member of either Board at any meeting. Members of the Special Board hold office during the pleasure of the Governor-General. The Special Board has the same powers and functions as the Main Board. At this stage it cannot be known when a Special Board will be appointed and how actively it will function.

LOCAL AUTHORITIES' LOANS

THE LOCAL AUTHORITIES LOANS BOARD

137. This Board was established by the Local Authorities Loans Board Act 1956. It consists of the Secretary to the Treasury, the Commissioner of Works, and five other persons appointed by the Governor-General and holding office during his pleasure. The Act does not stipulate any qualifications for the five appointed members. The Chairman is appointed by the Governor-General. Four members form a quorum of the Board, which has the powers of a commission of inquiry and may make rules governing its procedure.

FUNCTIONS OF THE BOARD

138. The principal function of the Board is to decide upon applications by local authorities for permission to raise loans. The Act prohibits any local authority from borrowing any money otherwise than in anticipation of revenue without first submitting an application to the Board for its approval. The Board has wide

powers to deny or sanction the whole or part of the application unconditionally or subject to such terms and conditions as it thinks fit. In exercising any of its powers the Board may have regard to the national economy. If a loan application is declined by the Board no further application in respect of the same loan proposal can be made for 12 months unless in the meantime there has been a material change in circumstances.

NO RIGHT OF APPEAL

139. The powers exercised by the Board are obviously of critical importance in their effect on the national economy. It is not surprising that no right of appeal has been granted, since the presence of the Secretary of the Treasury and the Commissioner of Works is no doubt intended to ensure that Government policy is authoritatively represented to the Board in its deliberations. Moreover local authorities may be expected to be strongly represented when pursuing an application and their position is hardly comparable with that of the private citizen. In any event an application may be renewed at any time if circumstances have changed or, at the latest, after 12 months from the decision on an earlier application. While a right of appeal is ideally desirable in that smaller local authorities may conceivably suffer in comparison to larger, the case for leaving the final decision with the Board is, if not overwhelming, certainly a very strong one.

8

Labour and Industry

INDUSTRIAL CONCILIATION AND ARBITRATION

COURT OF ARBITRATION

140. This Court is constituted under the Industrial Conciliation and Arbitration Act 1954 and is presided over by a Judge who must be a barrister and solicitor of not less than seven years' standing and who holds office during good behaviour to the age of 72. There is provision for the appointment of an additional Judge. The remaining two members of the Court are appointed in one case on the recommendation of the unions of employers and in the other on the recommendation of the unions of workers. Nominated members hold office for three years and are eligible for reappointment.

JURISDICTION OF THE COURT

141. The Court has jurisdiction over the settlement of any industrial dispute referred to it under the Act, and certain other powers and functions. Thus the Court (by the Judge sitting alone) has power to determine the legality of any disputed union election. The Court also has power to interpret its awards and to decide what constitutes a breach, and to decide on an appeal from the registrar whether any proposed union rule is oppressive or unreasonable. A most important function is to make general wage orders from time to time. In all the matters that come before it the Court has full and exclusive power to determine them and to make such order as in equity and good conscience it thinks fit.

PROCEDURE

142. Sittings of the Court are held in public unless the Court orders otherwise. Parties may issue summons for the attendance of witnesses, and the Court may accept and call for such evidence as in equity and good conscience it thinks fit, whether strictly legal evidence or not. The Court may also make rules regulating the practice and procedure before it. A privative clause purports to prevent the removal of proceedings to any court by certiorari or otherwise, and to afford them unchallengeable finality. In view of

consistent rulings of the Supreme Court[1] this provision is insufficient to prevent the Supreme Court determining whether the Arbitration Court has acted within its jurisdiction, and it is difficult to understand why it was repeated in this form in the 1954 Act.

CASE STATED

143. The Judge of the Court is empowered to state a case for the opinion of the Court of Appeal on a question of law arising in any matter before the Court.

WATERFRONT INDUSTRY

WATERFRONT INDUSTRY COMMISSION

144. The Waterfront Industry Act 1953 establishes a Waterfront Industry Commission which is a corporation sole consisting of a single Commissioner appointed for a term of five years by the Governor-General on the recommendation of the Minister of Labour. The functions of the Commission include carrying out the administrative work in connection with the engagement, employment, and payment of waterside workers other than those directly employed, with the prior approval of the Waterfront Industry Tribunal, by any employer of waterfront labour. In addition the Commission must administer payment of guaranteed minimum wages, holiday pay, and cooperative contract systems; provide authorised amenities for waterside workers; and compile records relating to waterside work. The Commission may also impose levies on ship owners or employers for the provision of labour engagement bureaus and central pay offices and a host of other matters relating to waterside work.

WATERFRONT INDUSTRY TRIBUNAL

145. This Tribunal consists of three members appointed by the Governor-General on the recommendation of the Minister for a term of three years. The Chairman must be a barrister and solicitor of the Supreme Court of not less than seven years' practice in the Supreme Court. No qualifications are stipulated for the other members. The Tribunal has the powers of a commission of inquiry and may issue summons for the attendance of witnesses before it. It may regulate its own procedure, and all appeals are to be heard in public unless the Tribunal for good cause orders otherwise.

FUNCTIONS OF THE TRIBUNAL

146. The Tribunal has power to make, amend, and interpret principal orders prescribing the pay and conditions of work of

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[1] See *New Zealand Waterside Workers' Federation* v. *Frazer* [1924] N.Z.L.R. 689; *Butt* v. *Frazer* [1929] N.Z.L.R. 636; *In re Otago Clerical Workers' Award* [1937] N.Z.L.R. 578.

waterside workers; to settle or prevent disputes in relation to waterside work; to control and direct the activities of port conciliation committees; to investigate any matter which it considers is likely to cause delays to waterside work; and to determine appeals from certain decisions of port conciliation committees, the National Amenities Committee, and decisions or orders of the Commission imposing levies or charges. It thus exercises a miscellany of legislative, administrative, and judicial functions. On hearing appeals it may confirm, modify, or reverse the decision or make such other decision or issue such directions as it thinks fit. The Act contains a privative clause in the usual form.

147. The present Chairman of the Tribunal is the Judge of the Land Valuation Court, who also holds office as Appeal Authority under the Transport, Air Services Licensing, and Local Government Commission Acts. All of these functions could appropriately be vested in the proposed Administrative Court, unless for political or other reasons it is considered desirable completely to insulate the Waterfront Industry Tribunal from any other administrative appeal body.

WORKERS' COMPENSATION

COMPENSATION COURT

148. This Court, which is a Court of Record, is established by the Workers' Compensation Act 1956 and consists of a Judge who must be a barrister and solicitor of not less than seven years' standing of the Supreme Court. The Judge holds office during good behaviour or until the age of 72. The Court has exclusive jurisdiction to adjudicate upon proceedings for the recovery of workers' compensation or the settling of any questions as to the distribution of compensation among dependants. Where the sum involved does not exceed £50 and the parties agree, the proceedings for the recovery of compensation may be heard in the Magistrate's Court.

PROCEDURE

149. Every action in the Court must be commenced by writ of summons and the procedure is in accordance with regulations made under the Act. The most recent Compensation Court rules, which date from 1959, number 209 and are closely analogous to those governing actions in the Supreme Court. However, the Court may call for whatever evidence in equity and good conscience it thinks fit, whether this is strictly legal evidence or not. No appeal lies from any decision of the Court and the usual privative clause obtains.

NO RIGHT OF APPEAL

150. As the plaintiff in proceedings before the Compensation Court is almost always an employee of modest means (not infrequently, however, financed in part or wholly by his union), the policy of the Legislature has been to isolate these actions from the more formal and expensive atmosphere of the Supreme Court. Moreover early experience, particularly in England, showed an alarming tendency for this class of action, when in the jurisdiction of the High Court, to gravitate on appeal to the House of Lords. This resulted in ever-increasing complexity in the law. In the interests of the litigants the Compensation Court, except on questions of jurisdiction, has the exclusive and final right to determine actions before it, and few would suggest that this position should be changed by conferring a right of appeal.

151. It is worth noting that the present Judge of the Court holds office as Appeal Authority under the Trade Practices and Motor Spirits Licensing Acts. While the case for merging the Compensation Court with the proposed Administrative Court is admittedly less strong than that for transferring various appellate authorities, the suggestion that this should be done will be made later in this report.

SHOPS AND OFFICES

SHOPS AND OFFICES EXEMPTION TRIBUNAL

152. This Tribunal was set up in a 1959 amendment to the Shops and Offices Act 1955. The Tribunal consists of one member appointed by the Governor-General on the recommendation of the Minister of Labour. No term of office is stipulated. The person appointed must be qualified to be appointed as a Stipendiary Magistrate or have held office as a Stipendiary Magistrate.

FUNCTION OF TRIBUNAL

153. The function of the Tribunal is to hear and determine applications by the occupiers of any shops which are required to be closed at any time by any provision of the Shops and Offices Act, or of any award, for total or partial exemption from these provisions. On filing an application for exemption the occupier is obliged to give public notice of his application and to serve a copy on the Inspector of Shops and Offices and every industrial union of shop workers and employers affected by the application. The Tribunal in hearing an application has the powers of a Magistrate under the Magistrate's Court Act to the same extent as if the application were an originating application in the Magistrate's

Court. At the hearing any occupier of a shop, union of workers or employers, or any other organisation likely to be affected, is entitled to be heard. The Tribunal, after taking into account the matters set out in the Act, may in its discretion refuse an application for exemption or grant the application either wholly or in part and subject to whatever conditions it thinks fit.

NO RIGHT OF APPEAL

154. The Act provides that there shall be no right of appeal from any decision of the Tribunal; it does, however, empower the Tribunal at any time on application by the occupier of any shop affected by the order, or by any union of workers or employers, to revoke or vary any order of the Tribunal. While this is a worthwhile provision it is no substitute for a right of appeal. If applicants for a milk vendor's licence or a transport licence have a right of appeal to a higher tribunal it is difficult to see why there should not be a similar right under this Act. A Judge of the proposed Administrative Court would be an appropriate Appeal Authority.

9

State Service

STATE SERVICE TRIBUNALS

155. The various State Service Tribunals all conform to a fairly uniform pattern which it is proposed to describe in a general way only. The Tribunals are the:

Public Service Appeal Board, constituted by the State Services Act 1962;

Government Service Tribunal, constituted by the Government Service Tribunal Act 1948;

Government Railways Appeal Board and *Government Railways Industrial Tribunal*, each constituted by the Government Railways Act 1949;

Post Office Appeal Board and *Post Office Staff Tribunal*, each set up by the Post Office Act 1959; and the

Police Appeal Board, constituted by the Police Act 1958.

156. In each case the membership of the Board or Tribunal numbers three, the general pattern being that of an independent Chairman (who in some cases is required to be a Judge of the Arbitration Court or a Stipendiary Magistrate) with a Government or departmental representative and a representative from an employees' organisation. Tenure of office in almost all cases is three years. The Tribunals are similar in composition to the Court of Arbitration. Two of them, namely, the Government Service Tribunal and the Government Railways Industrial Tribunal, are concerned with fixing wages scales, and the remainder principally with appeals or matters affecting promotion, discipline, and dismissal. The Post Office Staff Tribunal is an advisory body only, its function being to make recommendations on matters in dispute between the Post Office management and staff.

PROCEDURE

157. In the case of the four Appeal Boards, regulations prescribe, in various degrees of detail, the procedure to be followed by appellants in lodging appeals and by the Boards in hearing and determining them. The relevant statutes governing the Government Service Tribunal and the Government Railways Industrial Tribunal each contain some detailed provisions as to the steps to be followed

by parties in presenting their case to these Tribunals, but leave the respective Tribunals largely free to determine their own procedure. With the exception of the Post Office Act 1959, all the statutes under discussion contain a privative clause, the form of which varies considerably.

158. The laying down of relatively detailed procedural rules for the four Appeal Boards is in marked contrast to the virtual absence of such rules in the case of almost all other tribunals considered in the preceding chapters. As would be expected, the three Courts (Compensation, Arbitration, and Land Valuation) have promulgated quite detailed rules of practice and procedure; but apart from a prescribed form of appeal in a number of cases there is an almost complete absence of rules, and the procedure both of the tribunals of first instance and on appeal is very much at large.

10

Miscellaneous Tribunals

TAXATION

BOARDS OF REVIEW

159. The Inland Revenue Department Amendment Act 1960 provides for the establishment of one or more boards of review. Every board is to consist of three members, of whom one, the Chairman, is to be a barrister and solicitor of not less than seven years' practice. No qualifications in the other two members are called for by the statute. All members are appointed by the Governor-General for such term not exceeding seven years as the Governor-General thinks fit. Somewhat surprisingly the Act permits the appointment of a Crown employee, such service being deemed Government service for the purpose of the State Services and other Acts. As one of the principal functions of a board is "to sit as a judicial authority for hearing and determining objections to assessments of tax or duty", the principle of judicial impartiality would be better served if members of the Public Service, at least those of the Inland Revenue Department, were ineligible for appointment. In addition to the function just referred to, the board is required to sit judicially on objections to decisions or determinations of the Commissioner under the Inland Revenue Acts. In this way various discretionary powers of the Commissioner are reviewed by the board.

HEARING BY THE SUPREME COURT

160. Part I of the Land and Income Tax Amendment Act 1960 contains certain machinery provisions governing objections to assessments and also amends the principal Act by conferring a right of objection to various discretionary decisions of the Commissioner. An objector or the Commissioner has the right to require any objection which relates to a question of law to be referred direct by way of case stated to the Supreme Court. In addition an objection relating to a question of fact (whether or not it also relates to a question of law) may be referred direct to the Supreme Court either by consent of the objector and the Commissioner, or by leave of the Supreme Court on the application of either the objector or the Commissioner. Such leave may be granted by the Court in cases where the amount of tax in dispute or the general

or public importance of the matter or its extraordinary difficulty is such that it is desirable, for this or any other reason, that the objection be heard by the Supreme Court.

PROCEDURE BEFORE THE BOARD

161. The board has the powers of a commission of inquiry and, subject to any regulations, determines its own procedure. Regulations require a case to be stated by the Commissioner, and the objector may file an answer. For the purposes of hearing and determining objections the board has all the powers, duties, functions, and discretions of the Commissioner. The hearing must be held in private, and no costs may be awarded. The board is empowered to receive any evidence which may in its opinion assist it to deal effectively with the proceedings before it, whether or not that evidence would be admissible in a court of law. The board is required to give its decision in writing and, on the request of the objector or the Commissioner at the hearing or at the time the decision is given, must state in writing its findings of fact and any reasons in law for the decision.

CASE STATED TO THE SUPREME COURT

162. The board may at any time of its own motion, or on the application of either the objector or the Commissioner, state a case for the opinion of the Supreme Court on any question of law. The Supreme Court may remove any such case into the Court of Appeal for its decision.

APPEAL TO THE SUPREME COURT

163. An appeal lies to the Supreme Court against any decision on a question of law, but the board's findings of fact are final and conclusive. The Supreme Court may remove any such appeal into the Court of Appeal.

FURTHER APPEAL TO THE COURT OF APPEAL

164. Either the objector or the Commissioner may appeal to the Court of Appeal against the decision of the Supreme Court on any case stated or case on appeal.

165. A board's functions under the Act are both judicial in the strict sense and also extend to reviewing a number of discretionary decisions of the Commissioner. The board appears to be free to substitute its unfettered discretion for that of the Commissioner and in so doing exercises the administrative powers of the Commissioner. In view of the important issues frequently involved in tax appeals there is a strong case for the Chairman of an appeal board being a Judge of the proposed Administrative Court.

EARTHQUAKE AND WAR DAMAGE

EARTHQUAKE AND WAR DAMAGE COMMISSION

166. This Commission was established by the Earthquake and War Damage Act 1944 and comprises the Minister of Finance, who is to be Chairman, the Secretary to the Treasury, the State Insurance Office General Manager, and four other members appointed by the Governor-General and holding office during his pleasure. The Governor-General may appoint one of the members to be Deputy-Chairman, and in practice this is done. The Commission is a body corporate and is charged with executing the provisions of the Act. No qualifications are specified for the four appointed members. Four members constitute a quorum at meetings of the Commission which may regulate its own procedure.

NO RIGHT OF APPEAL

167. Although the Commission has power to decide very substantial claims, its decisions, except as to quantum, are final and conclusive. Disputes as to quantum are to be settled by arbitration, but this point may never be reached if the Commission decides that any particular claim is not within the scope of the Act and regulations. The highly unsatisfactory nature of the statutory definition of the Commission's power and functions is graphically revealed in the recent case of *Low* v. *Earthquake and War Damage Commission*[1]. Only after an exhaustive consideration of the history of the legislation affecting the Commission and its present powers and functions was the Supreme Court able to spell out a duty on the part of the Commission to comply with the rules of natural justice in deciding upon claims for indemnity under the Act. While in the present state of the law as interpreted by the courts the correctness of the decision may be questioned its manifest justice cannot be disputed. As the Court held, the Commission was determining a question affecting the rights of subjects, and it is unsatisfactory that when the question arises in any given case as to whether this imposes a duty on the administrative authority to act fairly in dealing with matters in issue, it should from time to time be necessary for the parties to engage in expensive litigation to have the matter determined. Nor is there any guarantee that the issue will be resolved in favour of the party whose rights are affected.

168. The finding of the Supreme Court in the *Low* case that the Commission failed to accord a fair hearing led to its decision being quashed. It then became necessary for the Government to appoint

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[1] [1959] N.Z.L.R. 1198.

an independent tribunal (a retired Supreme Court Judge), to hear the matter anew. The claim involved complex questions both of law and of fact and led, after a full hearing, to the Commission being overruled. The case for more adequate procedures being adopted by the Commission is obvious, as is the need for an appeal authority who could very appropriately be a Judge of the proposed Administrative Court.

CRIMINAL INJURIES COMPENSATION

CRIMES COMPENSATION TRIBUNAL

169. This Tribunal is believed to be unique at least in the Commonwealth. It is established under the Criminal Injuries Compensation Act 1963 which came into force on 1 January 1964. The Tribunal, which at the time of writing has not yet been appointed, is to consist of three members appointed by the Governor-General on the recommendation of the Minister of Justice. The Chairman is to be a barrister or solicitor of not less than seven years' practice whether or not he holds or has held judicial office. Members hold office for a term of five years and are eligible for reappointment.

FUNCTIONS OF TRIBUNAL

170. The Tribunal is empowered to award compensation where any person is injured or killed by any act or omission of any other person which is within the description of any of the offences set out in the Schedule to the Act. Among these offences are the crimes of rape, sexual assaults, murder or manslaughter, wounding or injuring with intent, assaults, poisoning, and endangering transport. Injury means actual bodily harm and includes pregnancy and mental or nervous shock. Compensation may be awarded to the injured person, to any person responsible for the maintenance of a victim who has suffered or incurred loss or expense, and, in the case of the death of a victim, to or for the benefit of the victim's dependants. In deciding whether to award compensation, the Tribunal may have regard to all such circumstances as it considers relevant and must take into account any behaviour of the victim which in any way contributed to his injury or death. The Tribunal must be satisfied on the balance of probabilities that there was an act or omission in terms of the Act and that injury or death was occasioned thereby. An order made under the Act does not affect the right of any person to recover damages or compensation from any other person by civil proceedings under any statute or rule of law. The various heads of compensation are specified and

maximum amounts are stipulated. Subject to such maxima the Tribunal may award such compensation as it thinks fit. Allowance must, however, be made for any sums payable under Part VI of the Transport Act 1962; the Workers' Compensation Act 1956; the Social Security Act 1938; or the War Pensions Act 1954; in respect of any injury or death of a victim. The Tribunal may, in certain circumstances, vary any order for payment of compensation.

PROCEDURE

171. The Tribunal is deemed to be a commission of inquiry under the Commissions of Inquiry Act 1908 and has power to summon witnesses and require the production of documents. The Chairman and one other member constitute a quorum. Reasons must be given for each decision. The tribunal must sit in public unless in any particular case, having regard to the fact that any offender has not been convicted, to the interests of the victim of an alleged sexual offence, or to the interests of public morality, the Tribunal decides otherwise. The applicant and any other person who satisfies the Tribunal that he has a substantial interest in the proceedings may appear in person or by counsel and has the right to produce evidence and cross-examine witnesses. Counsel may also appear to assist the Tribunal. An order prohibiting the publication of the whole or part of the proceedings may be made in certain circumstances. The Tribunal may receive such evidence as it thinks fit whether or not admissible in a court of law and may make such order as to costs as it thinks fit. There is a privative clause in the usual form and no right of appeal except as detailed in the next paragraph.

RECOVERY OF COMPENSATION

172. Where any person is convicted of any offence and an order for compensation is made under the Act the Tribunal may, in its discretion, on the application of the Secretary for Justice, make an order directing the offender to refund the whole or part of the compensation either by lump sum or in periodical payments. Any such order may be varied. The offender may appeal to the Supreme Court against the making of any such order.

COMMENT

173. This Tribunal is one of two important new bodies brought into being in 1963. The second is the Indecent Publications Tribunal discussed below. Their establishment is cogent evidence – if evidence be required – that the Legislature continues to prefer to constitute a special adjudicative organ in preference to enlarging the jurisdiction of one of the regular courts of law. Thus do administrative tribunals concerned with social policy proliferate.

Of this Tribunal, as of so many others, it can be said that an Administrative Court could readily assimilate its functions. Either the Chief Judge of the proposed Administrative Court or the Judge having jurisdiction over the Workers' Compensation Act could, with two additional members, very satisfactorily exercise the functions of the Tribunal. It is difficult to believe that the confidence of the public in the administration of this novel and important legislation would not thereby be enhanced.

INDECENT PUBLICATIONS

INDECENT PUBLICATIONS TRIBUNAL

174. This is the second important Tribunal established in 1963. The Indecent Publications Act constitutes a Tribunal to consist of a Chairman having the same legal qualifications called for by the Criminal Injuries Compensation Act 1963 and four other members of whom two at least shall have special qualifications in the field of literature or education. The members are to be appointed by the Governor-General on the nomination of the Minister of Justice for a term of five years. Subject to certain limitations members are eligible for reappointment.

FUNCTIONS OF THE TRIBUNAL

175. The functions are:

(a) To determine the character of any book or sound recording submitted to it for classification;

(b) To classify books and sound recordings submitted to it as indecent or not indecent or as indecent in the hands of persons under a specified age or as indecent unless their circulation is restricted to specified persons or classes of persons or unless used for a particular purpose, as the case may be;

(c) To hear and determine any question relating to the character of a book or sound recording referred to it by a court in any civil or criminal proceedings, and to forward a report of its findings to that court.

The Act specifies the matters to be taken into account by the Tribunal in classifying or determining the character of any book or sound recording. It also provides for the reference to it by a court where in any civil or criminal proceedings a question arises as to whether any book or sound recording is indecent within the meaning of the Act. The Tribunal is given exclusive jurisdiction to determine such questions.

PROCEDURE

176. The Chairman and two other members constitute a quorum but the Chairman is enjoined to ensure as far as practicable that all five members are present at any sitting at which, in his opinion, difficult or important matters are to be considered. Decisions may be made by a majority. The Tribunal may receive such evidence as it thinks fit whether or not admissible in a court of law; it has the powers of a commission of inquiry with power to summon witnesses and compel the production of documents.

PUBLICATION OF REFERENCE TO PROCEEDINGS

177. All proceedings before the Tribunal and on appeal from the Tribunal are to be open to the public unless the Tribunal or the Supreme Court on appeal considers that the interests of public morality require otherwise. The Tribunal may order that no reference to any proceedings before it or its decision may be published in any newspaper other than the *Gazette* or be made in any radio or television broadcast, or may limit publication or broadcasting except where a difficult or important question has been considered in which case no order prohibiting publication or broadcasting of the decision may be made. Advice of decisions in technical publications circulating among librarians, booksellers, publishers, or members of the legal or medical professions cannot be prohibited. Anyone affected by an order of the Tribunal prohibiting publication as above may apply to the Supreme Court in a summary way for a review of the Tribunal order.

DECISIONS OF TRIBUNAL

178. The Tribunal is required to announce its decision and give reasons for it in writing and in open court and may make such order as to costs as it thinks fit. Every decision and classification of the Tribunal or the Supreme Court on appeal must be published in the *Gazette*.

APPEALS

179. Any party to proceedings before the Tribunal may appeal to the Supreme Court (consisting of at least three Judges) against a Tribunal decision. The Supreme Court is to hear and determine the appeal as if the decision of the Tribunal had been made in the exercise of a discretion. The intention of the Legislature is presumably to restrict the right of appeal in the sense that the Supreme Court does not hear and determine the matter *de novo*. The decision of the Supreme Court on appeal is final.

REFERENCE TO SUPREME COURT

180. The Tribunal may, if in doubt as to its jurisdiction to hear and determine any question, refer that matter to the Supreme Court for a decision.

RECONSIDERATION OF DECISIONS

181. Any person may, with the leave of the Minister of Justice or the Chairman, resubmit any book or sound recording to the Tribunal for a reconsideration of its decision not less than three years since the book or recording was last considered by the Tribunal or Supreme Court, and the Tribunal may alter or confirm its previous decision, classification, or determination. Where the decision to be reconsidered is that of the Supreme Court the Tribunal shall refer the submission to that Court with or without a written report.

COMMENT

182. The passage of this Act raised a good deal of controversy in the community. Censorship of books, a necessary evil, is inevitably an extremely sensitive matter in a democracy. Clearly the personnel of this Tribunal is of critical importance. For this reason it cannot be suggested that the functions of the Tribunal would necessarily be better or even as well performed by an Administrative Court. It would therefore be unwise to restrict the choice of the presiding officer, who must be legally qualified, to the relatively few Judges of the proposed Administrative Court.

PART III

11

Tribunals in General

INTRODUCTORY

183. The miscellany of tribunals, boards, and authorities described in the preceding sections is not complete. For instance, the several boards set up under the Education Act 1914 and its amendments, the many statutory bodies controlling the professions and trades, and almost all authorities operating in the area of local government have been omitted. Nor has there been a thorough attempt to explore the maze of statutory regulations where additional tribunals might well be found.

184. The list is sufficiently long and varied, however, to demonstrate two things. First, the far-reaching intervention of the state in the affairs of the citizen. Secondly, the bewildering complex of legal bodies set up over the years to effect the many purposes of government. While in more recent years some attempt has been made to rationalise the constitution and powers of appeal authorities, this is the only significant move towards consistency. For the rest the structure, composition, and procedure of tribunals is haphazard and in part, at least, fortuitous.

185. It must be recognised at the outset that one of the great virtues of administrative tribunals is their flexibility. Different problems require to be solved in different ways. Hence the structure of tribunals operating in the licensing field will necessarily differ from those dealing with land settlement. A fundamental justification for administrative tribunals is that they lack the rigidity and formalism usually associated with the regular courts. But while this great advantage is recognised it must still be said that the confused and inconsistent pattern revealed in the foregoing analysis calls for rectification. The overall pattern of our administrative tribunals need not be as unsystematic as it is. These tribunals now share with the regular courts the task of administering justice over a wide area. The time has more than arrived to attempt some rationalisation in the light of certain fundamental principles. By so doing the quality of their work will be enhanced and the confidence of the public in their decisions correspondingly increased. This is of critical importance to good government.

186. In some cases at least administrative tribunals have been conceived by government as arms of the administration, and their

statutory composition has mirrored this view. The Price Tribunal is a notable example. This concept was rejected by the Franks Committee:

> Tribunals are not ordinary courts, but neither are they appendages of Government Departments. Much of the official evidence, including that of the Joint Permanent Secretary of the Treasury, appeared to reflect the view that tribunals should properly be regarded as part of the machinery of administration, for which the Government must retain a close and continuing responsibility. Those for example in the social service field would be regarded as adjuncts to the administration of the services themselves. We do not accept this view. We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than part of the machinery of administration . . .[1]

The ensuing analysis is based on the premise that the Franks Committee concept is equally valid for New Zealand tribunals since, speaking generally, they perform functions comparable to those of their United Kingdom counterparts.

CONSTITUTION

187. It is to be expected that the composition of tribunals will vary considerably in terms of the number of members and their qualifications. What is surprising is that there is no settled method of appointment, tenure varies greatly, appointment of the chairman is haphazard, and special qualifications for office may or may not be stipulated in cases where they are obviously desirable.

METHOD OF APPOINTMENT

188. In some cases the tribunal will be appointed by the Minister, in others by the Governor-General on the recommendation of the Minister, in yet others by the Governor-General in Council. Bearing in mind the adjudicative functions of most tribunals and the desirability of ensuring that persons of a judicial temperament are appointed, there is much to be said for all appointments being first approved by the Attorney-General. Where special qualifications are called for it is rare to find these stipulated for all members, and the non-specialist members (one of whom will frequently be chairman) at least should be approved by the Attorney-General.

CHAIRMEN

189. The most important member of any tribunal is the chairman, and on him its relative success or failure will generally depend. Except in the comparatively rare cases where the chairman is appointed *ex officio*, his appointment should receive the prior approval of the Attorney-General. Following recommendations of the Franks

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[1] Franks Report, par. 40 at 9.

Committee, the Tribunals and Inquiries Act 1958 (U.K.)[1] provides that the chairmen of certain specified tribunals are to be selected from a panel of persons appointed by the Lord Chancellor. In addition the Council on Tribunals may make to the appropriate Minister general recommendations as to appointments to membership of any specified tribunals. The Minister is required to have regard to such recommendations. If, in New Zealand, the approval of the Attorney-General was required in the appointment of chairmen, and he was given power to veto any other appointment to a tribunal, this should go far towards ensuring that appointees would be suitably qualified. In many cases it will – as at present – be thought desirable to have a lawyer as chairman, whereas the qualifications of the other members will depend on the nature of the tribunal.

TENURE OF OFFICE

190. In some cases legislation requires members to be appointed for a fixed term of three years or longer, in others their appointment is to be for a *maximum* term of three or four years. The latter provision may lead to appointments of not more than one year, which may or may not be renewed. Most statutes permit reappointment.

191. Two of the strongest arguments for setting up administrative tribunals are that this permits the appointment of persons with special qualifications, and, where the jurisdiction is a relatively limited one, that it enables members to become expert quickly. But if members are removable at pleasure or are appointed for a very limited term they have both less incentive and opportunity to obtain the experience and knowledge necessary to ensure sound decisions. Nor, lacking any real tenure, will they have the full independence which is desirable in anyone exercising functions of a judicial character. If, as is later suggested, appeals from tribunals are in future heard by the proposed Administrative Court the question of tenure at the appeal level will be settled. Appointments to the inferior tribunals should, as a general rule, be for a fixed term of reasonable length. Three years appears to be more appropriate as a minimum than a maximum term. Further, such a requirement should ensure that greater care was taken in selecting suitable personnel.

PROCEDURE

192. There is general agreement[2] that it is neither desirable nor feasible to formulate a detailed code governing the procedure of all tribunals. A glance at the numerous and varied categories of

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[1] Sections 3, 4.

[2] Franks Report, par. 62–63 at 15.

tribunals surveyed earlier is sufficient to illustrate the impossibility of devising a single set of procedural rules which would be appropriate in all cases. But this does not mean that certain general rules covering critical matters cannot be formulated. More detailed rules for individual tribunals can then be made within the framework set by the general code. At the present time, as has been seen, almost all tribunals are left largely free to regulate their own procedure. An Act may sometimes stipulate a few machinery requirements, and regulations may prescribe details such as forms of application, time limits for appeals, and the like.

193. An attempt, widely acclaimed and very largely successful, has been made in the United States of America to lay down certain minimum standards of procedure to which administrative tribunals and agencies must conform. In the case of the Federal agencies this has been done through the Federal Administrative Procedure Act 1946; in addition, at least eight states[1] have enacted their own Administrative Procedure Acts to regulate state administrative agencies. The Massachusetts Administrative Procedure Act 1954, authoritatively regarded[2] as one of the best state statutes in this field, will serve as a useful guide. Reference will be made only to such provisions as are thought relevant to the New Zealand situation.

NOTICE

194. Subsection 1 of section 11 of the Massachusetts Act requires reasonable notice of an agency hearing to be accorded all parties, this to include statements of the time and place of the hearing. Parties must have sufficient notice of the issues involved to afford them reasonable opportunity to prepare and present evidence and argument. If the issues cannot be fully stated in advance of the hearing, they are to be fully stated as soon as practicable. In all cases of delayed statement, or where subsequent amendment of the issues is necessary, sufficient time must be allowed to afford all parties reasonable opportunity to prepare and present evidence and argument upon the issues.

195. A general provision to the foregoing effect could well be enacted here and applied to all administrative tribunals or at least to those scheduled in the Act. To avoid successful appeals on technicalities, however, the essential question should be not the adequacy of the original or subsequent notice but rather the overall fairness of the whole proceedings.

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[1] North Dakota (1941), Wisconsin (1943), Ohio (1943), Virginia (1944), Missouri (1945), Pennsylvania (1945), Michigan (1952), Massachusetts (1954). See Curran and Sacks, " Massachusetts Administrative Procedure Act ", 1957 B.U.L. Rev. 70.

[2] See K. C. Davis, 3 *Administrative Law Treatise*, at 430.

EVIDENCE

196. Almost without exception our legislation permits tribunals to admit such evidence as is thought fit whether legally admissible or not. The Massachusetts Act (section 11 (2)) contains an admirable formula which could with advantage be generally applied here. The subsection reads as follows:

> Unless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognised by law (e.g. against incrimination). Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.

Such a rule would leave tribunals with all the latitude reasonably necessary to carry out their task, but at the same time supply them with a standard which laymen should have no difficulty in applying. As matters stand, our legislation sets no limits to the admissibility of quite worthless evidence. Moreover the Massachusetts provision insists that a decision be based only on evidence which falls within the limits specified in the section. This should ensure that all decisions are founded on reasonably reliable evidence.

COMMISSIONS OF INQUIRY ACT

197. Some Acts expressly provide that parties are to have the right to call evidence and cross-examine witnesses. Others are silent and presumably rely on the provisions of the Commissions of Inquiry Act 1908 when this applies. Almost all tribunals are, for the purpose of conducting any inquiry or hearing, deemed to have the powers of a commission of inquiry. The Commissions of Inquiry Act 1908 was not enacted to regulate the powers of administrative tribunals, then in their infancy, but those of *ad hoc* inquiries. The incorporation of the provisions of a statute enacted for another purpose is an unsatisfactory method of defining the powers of administrative tribunals. The number and importance of our tribunals is such that the enactment of a statute dealing specifically with their procedure and powers in a general way is overdue.

RIGHT TO CALL EVIDENCE

198. A general code of administrative procedure should provide, as does the Massachusetts Act (section 11 (3)), that:

> (e)very party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence.

The Federal Administrative Procedure Act (section 8 (c)) qualifies a somewhat similar provision by providing (*inter alia*) that in determining claims for money or benefits or applications for initial licences any agency may, when the interest of any person will not be prejudiced thereby, adopt procedures for the admission of all or part of the evidence in writing. Some such provision is obviously necessary in the case of applications for social security benefits and import licences, but this might better be achieved by specific provision rather than by a discretionary power applicable to all licensing authorities.

OFFICIAL NOTICE

199. Administrative tribunals in the course of their work develop, if they do not originally possess, an expert knowledge of their particular field. Over a period of time they accumulate a knowledge of many facts, general, technical, or scientific as the case may be, and of some of these, parties appearing before them in a given case, may well be ignorant. It is most desirable that tribunals should be free to utilise their specialised knowledge to the full, but it is equally undesirable that in doing so they should take notice of facts not within the knowledge of the parties.

200. The Federal Administrative Procedure Act 1946,[1] the Model State Administrative Procedure Act,[2] and the Massachusetts Act each contain a provision to regulate this situation. The Massachusetts Act (section 11 (5)) provides:

> Agencies may take notice of any fact which may be judicially noticed by the Courts, and in addition may take notice of general, technical or scientific facts within their specialised knowledge. Parties shall be notified of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilise their experience, technical competence and specialised knowledge in the evaluation of the evidence presented to them.

The requirement of notice to the parties with a right to challenge is essential if tribunals are to be prevented from basing decisions either wholly or in part on material not introduced at the hearing. The last sentence of section 11 (5) is an express recognition of what tribunals are expected to do in reaching a decision. The foregoing provision, with suitable modifications, ought to be included in the general code of procedure for administrative tribunals.

SUBPOENAS

201. There is no uniformity as to the power of tribunals to summon witnesses. Some statutes make specific provision while at the same

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[1] Section 7 (*d*).

[2] Section 9.

time the provisions of the Commissions of Inquiry Act are deemed to apply. In all cases it seems desirable that both the tribunal and the parties before it should have the right to summon witnesses. A general provision applicable to all tribunals is required. The details, which could readily be settled, do not call for discussion here. Needless to say the American Administrative Procedure Acts contain provisions regulating this matter.

PUBLIC HEARINGS

202. There is no uniform provision requiring tribunals to sit in public. Thus the Cinematograph Films Act 1961 requires the Licensing Authority to sit in private and at the same time provides that the Appeal Authority is to sit in public, subject to the power of the Authority,

> if it considers it in the interests of the parties and of all other persons concerned (to) order that the hearing or any part thereof shall be held in private.

It is not easy to understand why the Licensing Authority is compelled to sit in private while the Appeal Authority must sit in public unless for good cause it rules otherwise. The licensing of cinemas is a matter in which members of the public have a legitimate interest, and licensing proceedings should therefore as a general rule be heard in public. The more usual provision is indeed to require the tribunal to sit in public but in most cases an escape clause, in terms similar to that quoted, is added.

203. The regular courts of law, save in the most exceptional cases, sit in public. In principle, administrative tribunals should do likewise. This was a matter on which the Franks Committee held strong views. In its report it states:

> We have already said that we regard openness as one of the three essential features of the satisfactory working of tribunals. Openness includes the promulgation of reasoned decisions, but its most important constituent is that the proceedings be in public. The concensus of opinion in evidence received is that hearings before tribunals should take place in public except in special circumstances . . .

and

> We are in no doubt that if adjudicating bodies, whether courts or tribunals, are to inspire confidence in the administration of justice which is a condition of civil liberty they should, in general, sit in public. But just as on occasion the courts are prepared to try certain types of case partly or wholly *in camera* so, in the wide field covered by tribunals, there are occasions on which we think that justice may be better done, and the interests of the citizen better served, by privacy.[1]

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[1] Franks Report, par. 76–77 at 19.

The Committee then considered three types of case in which tribunals would be justified in sitting in private. There were, first, cases where considerations of public security are involved. Secondly, and much more frequent, the case in which intimate personal or financial circumstances have to be disclosed. Social security applications and tax hearings are obvious examples. Thirdly, the type of case involving professional capacity and reputation.

204. Accordingly the committee recommended that where a tribunal is of a class which almost exclusively deals with any of these three types of case the hearing should be in private. All other tribunals should sit in public "subject to a discretionary power in the Chairman to exclude the public should he think that a particular case involves any of these considerations".[1]

205. The principles enunciated by the Franks Committee apply with equal force to New Zealand tribunals. A general rule reflecting these principles should be included in the code of procedure to govern all tribunals.

LEGAL REPRESENTATION

206. Some statutes expressly provide that parties may be represented by a solicitor or counsel, many are silent on the matter, and a few forbid it. In some cases, notably industrial disputes, legal representation except on questions of law has long been banned. Unless those immediately concerned seek a change there is little point in forcing it on them. But these are exceptional cases and in the remainder the strong recommendation of the Franks Committee that:

> this right (to legal representation) should be curtailed only in the most exceptional circumstances, where it is clear that the interests of applicants generally would be better served by a restriction.[2]

should be applied here. Accordingly a rule in the general code of procedure should confer this right save in respect to named tribunals.

PRIVILEGE

207. Most statutes are silent on the question of whether witnesses and advocates are to be absolutely protected from legal proceedings in respect of evidence or representations made at a tribunal hearing. That the present position is by no means clear appears from the judgment of the Supreme Court in a recent case.[3] It has long been established that witnesses and counsel appearing before regular courts have such immunity, the justification being that it is essential in the interests of justice to remove any inhibition on

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[1] idem, par. 81 at 20.

[2] idem, par. 87 at 21.

[3] *Thompson* v. *Turbott* [1962] N.Z.L.R. 298.

freedom of expression so that the truth may be fully ascertained. Like considerations, as the Franks Committee recognised,[1] apply to proceedings before administrative tribunals. A general immunity should therefore be afforded in the code of procedure.

FINDINGS AND REASONS

208. By no means all tribunals are required to state their findings of fact or give reasons for their decisions. If a reasoned decision is required, it is more likely to be a reasonable and satisfying one simply because the tribunal will necessarily have to evaluate the evidence and apply the relevant law in a rational way. In short, a reasoned decision is less likely to be arbitrary or capricious. Moreover the aggrieved party can better assess the advisability of an appeal if he knows the grounds of the decision against him.

209. In America virtually all federal and state courts, irrespective of any statutory requirement, have insisted that administrative agencies state their findings of fact. This is principally to facilitate judicial review, which includes review of the facts on the basis of the "substantial evidence" rule. Other reasons have to do with avoiding judicial usurpation of administrative functions, assisting parties to prepare their cases for rehearing or judicial review, and keeping agencies within their jurisdiction.[2] The Massachusetts Act (section 11 (8)) provides:

> Every agency decision shall be in writing or stated in the record. The decision shall be accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to the decision, unless the General Laws provide that the Agency need not prepare such statement in the absence of a timely request to do so . . .

The Federal Administrative Procedure Act 1946 (section 8 (b)) requires:

> findings and conclusions, as well as the reasons or basis therefore, upon all material issues of fact, law or discretion presented on the record . . .

to be included. Moreover the United States Supreme Court has insisted on administrative agencies stating reasons in order to facilitate review.[3]

210. The stringent requirements of the Massachusetts Act are relaxed when a statute provides that findings and reasons need not be given unless request is made to the agency concerned. It would be placing an unduly onerous burden on some of our tribunals if in every case they were required to give a fully reasoned decision. Applications under the Transport Act 1962 are an obvious example.

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[1] Franks Report, par. 82 at 20.

[2] See K. C. Davis, 2 *Administrative Law Treatise* at 444.

[3] idem at 476.

Moreover if, on appeal, the Appeal Authority is empowered to make independent findings of fact and not merely to review the reasonableness of the inferior tribunal's findings, there is less justification for requiring the inferior tribunal to state in writing all material findings of fact. At the same time, when questions of credibility arise, it is essential that the tribunal which sees and hears witnesses whose testimony conflicts should state which evidence is believed and which rejected.

211. A recommendation of the Committee on Ministers' Powers in its report (commonly referred to as the Donoughmore Report), presented to the United Kingdom Parliament in 1932, is relevant to this question. The Donoughmore Committee recommended in respect of decisions of all Ministers or ministerial tribunals to whom the function of adjudication is assigned that:

> (c) Any party affected by a decision should be informed of the reasons on which the decision is based; indeed it is generally desirable that the fullest amount of information compatible with the public interest should be given.
>
> (d) Such a decision should be in the form of a reasoned document available to all parties affected. This document should state the conclusions as to the facts and as to any points of law which have emerged . . .[1]

212. Twenty-five years later the Franks Committee recommended that "reasons should be given to the fullest practicable extent."[2] As a result of this recommendation the Tribunals and Inquiries Act 1958 (U.K.) (section 12 (1) and (2)) requires any specified tribunal:

> to furnish a statement either written or oral, of the reasons for the decision *if requested*, on or before the giving or notification of the decisions, to give the reasons.

There is a saving provision in cases of national security. Nor does the provision apply to decisions in respect of which any other statutory provision has effect as to the giving of reasons. Although the Donoughmore Committee called for a statement of conclusions as to facts as well as law in a reasoned decision the Franks Committee was less precise, and the ensuing statutory provision reflects this lack of precision in its failure to state expressly that material findings of fact are to be included in the statement of reasons.

213. On balance it would appear desirable that the general code of procedure should impose an obligation on all tribunals to state in writing their material findings of fact and reasons for their decisions unless exempted from this obligation by other legislation either absolutely or in the absence of a "timely request" so to do.

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[1] Committee on Ministers' Powers, Report, CMMD. 4060 (1932) (hereinafter cited as the Donoughmore Report) at 100.

[2] Franks Report, par. 98 at 24.

NOTIFICATION OF RIGHT OF APPEAL

214. If parties are not represented by counsel at the hearing they should be personally advised of the tribunal's decision, of their right to appeal, and of the time limits on their right of appeal. This was regarded as essential by the Franks Committee[1] and is expressly provided for in the Massachusetts Act.[2]

AN ADMINISTRATIVE PROCEDURE ACT

CONTENTS

215. No two tribunals are concerned with identical problems. The consequent diversity of economic, social, and other interests, militates against any single comprehensive code of procedure being imposed on all tribunals. Nevertheless it remains highly desirable to lay down certain minimum requirements. These standards should be formulated in an Administrative Procedure Act, an appendix to which should list all tribunals to which the Act applies. Tribunals should be exempted from the operation of the Act only to the extent that compliance with particular provisions would render their work ineffective.

216. The following basic requirements should be included in the proposed statute:

(i) *Notice* of the time, place, and issues to be given to all parties with adequate opportunity to prepare for the hearing (see par. 193–194).

(ii) *Evidence:* Tribunals need not observe the strict rules of evidence but should admit and act upon evidence only if it is the kind on which reasonable persons are accustomed to rely in the conduct of serious affairs (see par. 195).

(iii) *Evidence:* All parties should have the right to call witnesses, introduce exhibits, cross-examine, and call rebuttal evidence (see par. 196 and 198).

(iv) *Official Notice:* Tribunals may take notice of general, technical, or scientific facts within their specialised knowledge, provided they first give notice to the parties and opportunity to contest such facts (see par. 199–200).

(v) *Subpoenas:* Tribunals and parties before them should have the right to summon witnesses (see par. 201).

(vi) *Public Hearings:* All hearings should be in public except for strictly limited classes such as those affecting national security, intimate personal or financial matters, and professional capacity and reputation (see par. 202–205).

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[1] idem, par. 62 at 15.

[2] Section 11 (8).

(vii) *Legal Representation:* The right for parties to appear by counsel should be guaranteed except in the few cases such as industrial disputes where the parties have agreed otherwise (see par. 206).

unless "Statute" [illegible] [illegible]

(viii) *Privilege:* All witnesses and counsel appearing before tribunals and the members thereof should be absolutely privileged from legal suit in respect of evidence given or statements made at tribunal hearings (see par. 207).

(ix) *Findings and reasons* should be given either as of right or on timely request (see par. 208–213).

(x) *Notification of Right of Appeal:* Parties unrepresented by counsel should be advised of their rights of appeal and the time limits on appeal (see par. 214).

(otherwise given statute [illegible] [illegible])

217. The need for variation in the structure and composition of administrative tribunals is readily apparent and any attempt to impose a single uniform pattern will destroy their efficacy. Consistent with this need is the desirability of including in the Administrative Procedure Act provisions:

(i) Establishing a uniform method of appointment of members, preferably by the Governor-General in Council;

(ii) Requiring the prior approval of the Attorney-General to the appointment of chairman and all members other than those required to have special qualifications;

(iii) Requiring a fixed term of office, preferably not less than three years, to be stipulated in respect of membership of all tribunals.

see p 114 re – "substantial right" – affected by failure to comply

ADVANTAGES OF PROPOSED ACT

218. If tribunals are obliged in future to comply with these minimal procedural standards several advantages will accrue.

(i) Parties and their legal advisers will know in advance the broad outlines of the procedure that must be followed by tribunals. It will no longer be necessary for them to wait until the hearing itself to find out how it will be conducted.

(ii) Parties appearing before tribunals will have a greater assurance that the basic requirements for a fair hearing will be met.

(iii) Tribunals will remain free to prescribe detailed rules.

(iv) Public confidence in the work of tribunals will be enhanced by virtue both of fair procedures and the giving of reasoned decisions.

(v) The work of appeal authorities will be facilitated by a more orderly procedure on the part of the inferior tribunals and the requirement that they give reasoned decisions.

12

Administrative Appeal Authorities

INTRODUCTORY

219. It is to the credit of our system – if such it be – of administrative adjudication that an appeal lies from the decision of most tribunals. No tribunal, however fair, conscientious, and knowledgeable, can claim to be infallible. If an appeal lies against almost all decisions of the regular courts to a higher court, parties affected by decisions of inferior tribunals should likewise be entitled to a rehearing or a review by an appellate authority. There may be exceptional cases when an appeal is not feasible. For example, if a tribunal is required to be guided largely by matters of policy which cannot readily be formulated into rules or guide lines, then an appeal as such may be impossible. In such circumstances it is essential to ensure that the determining body is a strong one and that parties may apply to it from time to time for a rehearing in appropriate circumstances. Moreover, the tribunal ought to remain subject to judicial review on questions of jurisdiction, error of law, abuse of discretion, and a failure to comply with the rules of natural justice. It should not be immune from the obligation of acting both fairly and lawfully.

220. The Franks Committee accepted almost as axiomatic the desirability of a right of appeal.[1] In America, whether or not a right of appeal lies from an administrative authority or agency to a higher tribunal, judicial review is almost invariably available. Review by the courts is not confined to questions of jurisdiction, errors of law, constitutional questions (including due process), and arbitrary or capricious decisions, but extends to a determination as to whether the decision is supported by "substantial evidence". The courts in America unquestionably play a more active and influential role in the supervision of administrative action through review procedures than do their United Kingdom or New Zealand counterparts.

221. Reference has been made in earlier sections to certain tribunals against whose decisions there is no right of appeal. Prominent among these are the Earthquake and War Damage Commission, the Social Security Commission, the Price Tribunal, the Shops and Offices Exemptions Tribunal, and the Medical

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[1] Franks Report, par. 104–105 at 25.

Advertisements Board. Consideration needs to be given to the desirability of granting appeal rights to parties aggrieved by decisions of these and other bodies. It is difficult to discern any features in their constitutions or functions which render appeal to a higher tribunal unnecessary or impracticable.

PRESENT APPEAL PROVISIONS

222. Just as there is an extraordinary variety of administrative tribunals so there is a wide range of appeal authorities extending from *ad hoc* ministerial appointees to the Supreme Court. In so far as any tendency can be discerned, it is to create a special appeal authority where the number of appeals is thought to justify this course, but otherwise to assign the task to either the Magistrate's Court or the Supreme Court. However, a special authority may be constituted in cases where, despite the limited number of appeals, special qualifications are deemed necessary. It appears that the Magistrate's Court or the Supreme Court are vested with appeal jurisdiction not because such Courts are inherently better suited to adjudicate upon appeals from administrative bodies but rather for reasons of expediency. In some cases, as where character is in issue, the justification is more apparent.

MAGISTRATES AS ADMINISTRATIVE APPEAL AUTHORITIES

223. Our Magistrates' Courts are the modern successors to the lay justices of earlier centuries. In the seventeenth century and for some time afterwards lay justices of the peace exercised wide administrative powers as licensing authorities, tax assessors, and the like. Indeed, some of these tasks are still performed by justices. In New Zealand the Magistrates' Courts were constituted to exercise limited judicial jurisdiction in criminal and civil matters. Their jurisdiction in these areas has been continuously extended and they have accumulated additional duties such as rent control. Magistrates have traditionally presided over liquor licensing committees. In recent years they have also become a residual appeal authority in respect of a growing number of administrative decisions. The time would seem to have arrived for these miscellaneous appellate functions to be diverted to a more appropriate authority, leaving Magistrates free to concentrate on the duties arising from their expanding criminal and civil jurisdiction.

THE SUPREME COURT AS AN ADMINISTRATIVE APPEAL AUTHORITY

224. The Supreme Court has been cast in the role of an administrative appeal authority on relatively few occasions and Judges have shown little enthusiasm for the practice. Thus on an appeal to the

Supreme Court from the decision of the Motor Spirits Licensing Appeal Authority, which had reversed a decision of the Licensing Authority granting a retail licence, Finlay J. placed strict limits on the appellate functions of the Supreme Court. He construed the statute, which on its face appeared to authorise full review, as conferring jurisdiction to determine only the question of whether or not the discretion of the Appeal Authority had been exercised according to law. His reason for so narrowly construing the scope of the appeal was that:

> The subject-matter of the Appeal is essentially a matter of administration involving the exercise of discretion of an *ad hoc* body. The Licensing Authority must be assumed to have and no doubt has a knowledge of the whole business of vending of petrol, including a knowledge of all its incidents. The exercise of the functions of the authority necessarily postulates its knowledge of that knowledge. A similar knowledge must be attributed to the Appeal Authority. Any question concerning the sale of petrol which comes before the Licensing Authority or the Appeal Authority comes, therefore, before a tribunal having an instructed mind qualified, in consequence, by special knowledge to reach a wise and just conclusion on all questions of administrative discretion or policy. *None of the regular Courts of the country can have that special knowledge* and must always feel under some disability in determining questions in which policy and discretion are involved. . . . It is, to say the least, unlikely that the Legislature intended to clothe the Supreme Court, which has no specialised knowledge of the matters involved, with jurisdiction to determine in respect of matters of policy or administration, which of the two Authorities having the specialised knowledge has exercised the statutory discretion the more wisely or properly. . . .[1]

225. Again, in an unreported decision[2] under the Medical Practitioners Act 1950 Gresson J. was equally frank as to the invidious position of the Supreme Court on being required to reach an independent decision on appeal from a decision of the Medical Council which was specially qualified to determine the question in issue.

> The members of the Council were qualified of their own knowledge to form a judgment as to whether the treatment was or was not proper in the circumstances. The Court was not so qualified. . . .[3]

Such statements make it appear unlikely that the Supreme Court would regret or deplore the transfer of their existing appellate jurisdiction over administrative decisions to another body.

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[1] *Central Taxi Depot (Rotorua) Ltd.* v. *New Zealand Retail Motor Trade Assn.*, [1959] N.Z.L.R. 1167 at 1168–1169 (emphasis added).

[2] *In re Mears* (24 November 1955).

[3] This case and the *Central Taxi Depot* case are more fully considered by C. C. Aikman, " Some Developments in Administrative Law (1959) ", 22 *Journal of Public Administration* at 59–62.

STATUTORY APPEAL AUTHORITIES

226. The Legislature in recent years has with increasing frequency resorted to the device of creating special appeal authorities to determine appeals from licensing and other tribunals. Almost invariably the authority consists of one person who must be a barrister and solicitor of seven years' standing or, in few cases, of seven years' practice. The method of appointment and tenure of office vary, but there has been greater consistency in defining their powers and procedure. In practice the office of appeal authority has been filled in almost all cases by one or other of the three persons respectively holding office as Judge of the Compensation Court, the Land Valuation Court, and, until his recent retirement, the additional Judge of the Arbitration Court. In the case of the Town and Country Planning Appeal Board, the Licensing Control Commission (until recently), the Local Government Commission (until recently), and the Board of Review, the office of Chairman has been filled by a Magistrate. Similarly the various Government Service appeal tribunals have been presided over by either the additional Judge of the Arbitration Court or a Magistrate. In this way a limited number of experienced judicial officers have acquired a highly specialised knowledge of the particular spheres of administrative activity falling within their province. On the other hand each authority has tended to act in isolation from the others and very much as an anonymous body. Probably the very existence and identity of the appeal authorities are known to relatively few members of the public, and certainly few would understand their status and functions. Yet their decisions not infrequently affect the public collectively or individually in important ways. Although difficult to measure with any real accuracy, it does appear probable that, collectively, such decisions exceed in value the aggregate value of money and property in dispute in the Supreme Court in any one year.

227. The following three Courts of special jurisdiction must also be noted. The Land Valuation Court has jurisdiction over a wide range of decisions touching the valuation of land and property. The Arbitration Court has both appellate and original jurisdiction in the field of industrial relations. The Compensation Court adjudicates upon claims arising under the Workers' Compensation Act and is barely distinguishable from the regular courts in the nature of its functions and procedure.

13

An Administrative Court

REASONS FOR ESTABLISHING AN ADMINISTRATIVE COURT

228. It will have become apparent before now that a principal purpose of this report is to urge the establishment of an Administrative Court. With the continued growth of administrative tribunals the need for channelling appeals into one central body is becoming more obvious. Until it is done administrative justice will continue to be administered unevenly. This is inevitable while the supervisory bodies remain as disparate as at present.

229. The jurisdiction of the proposed Court should include most appellate functions of the Supreme Court and the Magistrate's Court in respect of tribunals and other administrative authorities; the appellate functions of the Land Valuation Court, the statutory appeal authorities, and boards and *ad hoc* bodies, together with the functions of the Compensation Court. In addition a right of appeal to this Court should be granted from tribunals where none presently exists. By this means the great majority of administrative appeals would fall under the jurisdiction of judges whose whole time was spent on work in this area. Clearly this is preferable to plucking a somewhat reluctant Supreme Court Judge or a Magistrate away from his regular duties to adjudicate upon a dispute which he is not fully qualified to decide.

230. The concentration of almost all administrative appeals in one court will have several important advantages. It will do much towards reducing the relative isolation of one appeal authority from another. It will afford greater opportunities for Judges of the Court to pool experience. There should be more incentive to establish a body of settled principles in areas where these would be useful. Although it will be desirable to have the functions of the Court assigned to various divisions a general set of rules applicable to all can be devised. The Judges in consultation can settle more detailed procedural rules in appropriate cases.

231. The jurisdiction of the proposed Court need not be confined to hearing appeals from administrative tribunals. In later sections of this report it will be recommended that a right of appeal to the Court be granted from some decisions of officials and administrative authorities other than tribunals. It will also be urged that the Court should have jurisdiction to determine on appeal whether a sufficient

hearing has been afforded citizens aggrieved by administrative decisions.

232. In some few cases it may be appropriate to give the Court original jurisdiction if the questions in issue are of sufficient importance. The Court might for instance replace the Trade Practices Commission, in which case there should be a suitable right of appeal on questions of law to either two or more Judges of the Supreme Court or direct to the Court of Appeal.

PUBLIC CONFIDENCE IN ADMINISTRATIVE JUSTICE

233. Perhaps the strongest justification for an Administrative Court is the desirability of strengthening the confidence of the public in administrative justice. So long as the present haphazard system continues citizens whose business or private interests are vitally affected by decisions of administrative tribunals will inevitably feel that they are receiving second-rate treatment. A litigant before the Magistrate's Court generally has a right of appeal to the Supreme Court, often in quite trifling matters. A party before an administrative tribunal whose livelihood or substantial investment may be at stake has no comparable right. An Administrative Court of high calibre would redress the balance. With the increase in status of those appeal authorities and chairmen of boards who become Judges of the proposed Court would come a corresponding increase in respect for their decisions. Nor would this added confidence result only from the increased status of the new Court; it would reflect the very real advantages, already referred to, flowing from a strong unified court.

234. The Franks Committee rejected a proposal put forward in evidence for the establishment of a general administrative appeal authority. But a main object of that proposal was to provide a high-level appellate tribunal *outside the framework* of the ordinary courts. The Committee saw several other disadvantages. They considered that a general tribunal would lack the experience and expertise which it should have.[1] In New Zealand, however, it has been found possible in many cases to appoint a single person as appeal authority even though the inferior tribunal comprised several members some of whom possessed special qualifications. Not all members of the Appeal Court need sit on each appeal. It has already been suggested that divisions of the Court would be desirable. The Franks Committee rejected this solution as differing little from existing arrangements, holding that the essence of the proposal would largely be lost. The Committee, however, gave no consideration to the various advantages which have been outlined earlier in this section; these remain valid for New Zealand whatever

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[1] Franks Report, par. 120–123 at 28–29.

the situation may be in the United Kingdom. Another disadvantage discussed by the Franks Committee does not apply to the proposals made for New Zealand. The Committee found that the proposal before them would inevitably involve a departure from the principle whereby all adjudicating bodies, whether designated inferior courts or tribunals, are in matters of jurisdiction subject to the control of the superior courts. No such departure is envisaged here. The Administrative Court, as will later appear, would remain subject to the control of the Court of Appeal. A further disadvantage discerned by the Committee was that final determinations on points of law would be made by the appeal tribunal and by the superior courts and these would on occasions conflict, giving rise to two systems of law. As a right of appeal to the Court of Appeal on all questions of law is here recommended this difficulty cannot arise.

COMPOSITION AND STRUCTURE OF THE PROPOSED COURT

COURT OF RECORD

235. The Court should be a Court of Record comprised of Judges and associate members. The Judges should hold office on terms similar to those of the present Judges of the Compensation and Land Valuation Courts. They should be lawyers of ability and standing who could, as the need arose, be drawn from private practice, the Government legal service, or on promotion from the bench of Magistrates or from an inferior administrative tribunal. In status the Court would fall between the Magistrates' and Supreme Courts, being comparable with the present status of the Compensation, Land Valuation, and Arbitration Courts.

DIVISIONS

236. To ensure the speedy acquisition and the retention of specialised knowledge there are obvious advantages in establishing divisions of the Court, to one or more of which Judges would be assigned. The alternative and less satisfactory method would be to have no divisions but nominated Judges. Having different divisions leads to procedural advantages. Rules not applicable to all matters within the jurisdiction of the Court could be made to regulate practice and procedure within a division, thus ensuring the necessary degree of flexibility. In England the High Court consists of three divisions, one of which includes such diverse matters as probate, divorce, and admiralty. But the existence of these divisions does not destroy the unity of the High Court as a whole. Many of the English Supreme Court rules have general application while each

division has rules appropriate to its particular jurisdiction. The following divisions might be desirable:

LICENSING DIVISION

237. The jurisdiction of this division could include cinematographic films, liquor, timber preservation, stock remedies, milk, air transport, road transport, transport charges, and motor spirits. At present the appeal authority is either a Judge of the Supreme Court, a Magistrate, or a barrister of seven years' standing. In each case he acts without lay or expert associates. The division of the appeal work among Judges assigned to this division could be a matter for the Chief Judge of the Court to settle.

TOWN PLANNING AND LOCAL GOVERNMENT DIVISION

238. The Town and Country Planning Appeal Board carries out work of considerable importance and has attained a high standard. If its functions are vested in the Administrative Court the Chairman would presumably become a Judge of the Court, the remaining members being appointed for a term of three years as associate members of this division. The same Judge might with advantage be assigned to determine appeals from the Local Government Commission. These are at present determined by the Local Government Appeal Authority who is also the Judge of the Land Valuation Court.

LAND VALUATION AND SETTLEMENT DIVISION

239. This division would replace the Land Valuation Court and could absorb appeals under the Land Act.

INDUSTRIAL DIVISION

240. The jurisdiction of the Compensation Court could be transferred to this division. The case for abolishing the Compensation Court is admittedly much less compelling than that for other adjudicatory bodies. But since the Judge of the Court, were it to remain independent, would almost certainly be a Judge of the Administrative Court as well, there is little point in maintaining separate courts. Amalgamation would have administrative advantages, and there appear to be no obvious disadvantages in a merger. On the other hand it may well be thought desirable to retain the Arbitration Court in its present form. This Court has been required over the years to deal with delicate and complex questions, and certain of its decisions are of critical importance to the well-being of the country. A body of law has been evolved along with a settled form of procedure. It occupies the full time of its members. These factors, among others, point to the desirability of the Court being left intact.

STATE SERVICES

241. Whether the functions of the Public Service Appeal Board, the Government Service Tribunal, the Government Railways Appeal Board, the Government Railways Industrial Tribunal, the Post Office Appeal Board, and the Police Appeal Board should be transferred to the Industrial Division of the proposed Court may be a more difficult question. Each of these bodies is presided over by a Judge or a Magistrate who will have qualities similar to those expected in a Judge of the Administrative Court. If jurisdiction were transferred to the new Court nominated associates should be assigned to sit with the Judge in the same way as at present. Nor need one Judge sit on all appeals; the work, if desirable, could be divided among Judges assigned to the division. There would be no justification for the various groups of Government employees affected by these appeal decisions feeling that a tribunal specially fashioned for their particular needs had been replaced by a less suitable body. The consolidation of these functions in the one court should ensure that a uniformly high standard of adjudication and orderly procedure was maintained. The Court could keep in continuous review the adequacy of its substantive powers and practice and procedure in consultation with interested parties. Unless political or other considerations outweigh the advantages of a merger it is recommended that it should proceed.

TAXES DIVISION

242. Besides adjudicating upon questions of fact and law the Board of Review has jurisdiction over a variety of discretionary decisions of the Commissioner. The recent transfer of tax cases from the Magistrate's Court to a new administrative tribunal (the Board of Review) is legislative recognition of the advantages of the administrative tribunal possessing specialised knowledge. Its functions appropriately fall within the scope of an Administrative Appeal Court. With the transfer of these functions to the proposed Court the Chairman of the Board would become a Judge and he would continue to sit with associate members as at present.

TRADE PRACTICES AND PRICES DIVISION

243. The establishment of a Restrictive Practices Court presided over by a Judge of the English High Court illustrates the importance attached by the United Kingdom Parliament to work in this area. Although the New Zealand Trade Practices Act confers a wider jurisdiction over restrictive trade practices than does its English counterpart, the status of the tribunal appointed to adjudicate disputes is in no way comparable. While it may not be desirable to burden the Supreme Court with this work there is a strong case

for up-grading the status of the tribunal operating in this important field. For this reason it is suggested that original jurisdiction under the Trade Practices Act 1958 be vested in the proposed Administrative Court to be exercised by an assigned Judge with associate members having special qualifications in this field. An appeal on questions of law could lie to the Supreme Court sitting as a full court or possibly direct to the Court of Appeal.

GENERAL DIVISION

244. Recommendations will be made later in this report that a right of appeal be granted against certain administrative decisions made not by tribunals but officials and others exercising statutory powers. These would be miscellaneous in character and should be heard by a General Division comprising an assigned Judge, possibly the Chief Judge, sitting with two associate members. One such member should be a person with extensive experience in public administration and the other a representative layman of standing in the community. If the jurisdiction of the General Division were to include appeals from local authorities (as ideally they should), an experienced local body councillor or officer might sit on such appeals in place of the public administrator.

FUNCTIONS AND POWERS OF THE COURT

245. A principal function of the Court will be to sit as a judicial body to hear and determine appeals. It is desirable that besides its strictly appellate jurisdiction the Court should exercise a general supervision over inferior tribunals. At present if the jurisdiction of a tribunal is challenged or its decision is sought to be quashed on grounds that it has not complied with the rules of natural justice or on any other ground, proceedings are launched in the Supreme Court for the issue of a prerogative writ or a declaration or injunction. There are powerful arguments for requiring such proceedings to be heard before the Administrative Court in the first instance. The question in issue will almost certainly call for an interpretation of a statute with which a Judge of the proposed Court will in many cases be more familiar than a Supreme Court Judge. The Administrative Court should have the widest powers to deal with any such appeal, including the right in appropriate cases to itself cure the defect by affording a proper hearing on the merits. If any party is dissatisfied with the ruling of the Administrative Court on jurisdiction or other questions of law he should have a further and final right of appeal to the Court of Appeal. If, as may reasonably be expected, the majority of decisions of the proposed Court are not challenged, the result will be that appeals

will be dealt with more cheaply and expeditiously. For the Administrative Court, unlike the Supreme Court, will in many cases be able to bring the litigation to an end by itself dealing with the merits, where these are in issue, as well as questions of law. In short, one hearing may frequently conclude the matter where two would at present be necessary.

246. The principal functions and powers of the proposed Court may be briefly stated as being:

(i) Where no, or no adequate hearing, was afforded by the tribunal below, to hold a full oral hearing.

(ii) Where there is no, or no adequate record, of the hearing below, to hold a full oral hearing.

(iii) In other cases to determine the appeal on the record of the hearing below with power to admit additional evidence on a showing of good cause for the failure of the party to call the evidence at the prior hearing.

(iv) In cases where credibility is of vital importance and there are no, or no sufficient findings, or the findings appear unsatisfactory, power to hear the witnesses.

(v) All such appeals to be by way of general appeal on the facts, law, and merits.[1]

(vi) In determining an appeal the Court shall give due weight to the special knowledge and experience of the tribunal below but, subject to this qualification, shall form its own opinion on all matters in issue.

(vii) In determining an appeal the Court may confirm, modify, or reverse the decision or refer the matter back to the tribunal below with appropriate directions.

(viii) To hear and determine all questions as to the jurisdiction and procedure of inferior tribunals with power to quash any decision, or to direct the tribunal to hear or rehear any matter according to law, and, in appropriate cases, itself to hear and determine the matter.

(ix) To hear and determine appeals from administrative officials and authorities other than tribunals as required by any statute, with power to refer the matter back with appropriate directions.

(x) To hear and determine appeals as to the right of any person to a hearing or the adequacy of any hearing under the provisions referred to in the next chapter, which would confer a right to a hearing on any person whose rights, property, or livelihood are affected by any administrative decision.

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[1] Franks Report, par. 105 at 25.

(xi) In all cases the Court shall give a written decision setting out its findings of fact and reasons.

(xii) Subject to the provisions of the Act and rules thereunder, the Court should regulate its own procedure.

ADMINISTRATIVE COURT RULES COMMITTEE

NEED FOR PROCEDURAL RULES

247. The Franks Committee recognised the importance of procedural rules. In its report it states:

> Most of the evidence we have received concerning tribunals has placed great emphasis upon procedure, not only at the hearing itself but also before and after it. There has been general agreement on the broad essentials which the procedure, in this wider sense, should contain, for example, provision for notice of the right to apply to a tribunal, notice of the case an applicant has to meet, a reasoned decision by the tribunal and notice of any further right of appeal. . . . We agree that procedure is of the greatest importance and that it should be clearly laid down in a statute or statutory instrument. Because of the great variety of the purposes for which tribunals are established, however, we do not think it would be appropriate to rely upon either a single code or a small number of codes. . . .[1]

The Committee recommended that the detailed rules of the various tribunals could be formulated by the Council of Tribunals in the light of its enunciation of general principles. In Chapter 11 of this report general principles applicable to New Zealand have been discussed, the recommendation there made being that such principles should be embodied in a general code of procedure. The question of detailed rules remains. The British solution is contained in section 8 of the Tribunals and Inquiries Act 1958 which requires the Council on Tribunals to be consulted before procedural rules are made.

248. It is not recommended that New Zealand should have a body similar to the Council on Tribunals. This Council sprang from the recommendation of the Franks Committee and is designed to exercise a measure of supervision over tribunals. The Committee, in discussing the need for supervision, said:

> Perhaps the most striking feature of tribunals is their variety, not only of function but also of procedure and constitution. It is no doubt right that bodies established to adjudicate on particular classes of case should be specially designed to fulfil their particular functions and should therefore differ widely in character. But the wide variations in procedure and constitution which now exist are

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[1] Franks Report, par. 62–63 at 15.

> much more the result of *ad hoc* decisions, political circumstance and historical accident than of application of general and consistent principles. We think there should be a standing body the advice of which should be sought whenever it was proposed to establish a new type of tribunal and which would also keep under review the constitution and procedure of existing tribunals.[1]

If the general principles discussed in Chapter 11 are embodied in legislation and made applicable to all tribunals only detailed procedural rules remain. These can be formulated in much the same way as rules of procedure for a variety of matters are settled by the Supreme Court Rules Committee.[2] The proposal is therefore that an Administrative Court Rules Committee be established.

COMPOSITION OF RULES COMMITTEE

249. The Committee should consist of:

(a) The Chief Judge and other Judges (at least four in number);
(b) A representative of the New Zealand Law Society;
(c) The Solicitor-General or his nominee;
(d) The Secretary for Justice or his nominee;
(e) A representative of each Department administering a statute under which an appeal lies to the Court; provided that each representative should attend and vote only on rules relating to the statute administered by his Department.

FUNCTIONS OF RULES COMMITTEE

250. There are few detailed procedural rules for tribunals. In some cases regulations prescribe application and appeal forms, the time for appeal, and details of this nature. To what extent the chairman of a tribunal is consulted by the Department before it makes procedural rules is not known. While Departments should certainly be heard on the content of tribunal rules, they should not have an unqualified power to make rules. By way of a check it is recommended that all rules prescribed by a Department (whether through the Minister or otherwise) should first receive the approval of the Rules Committee. The Committee should have power to add to or modify the proposed rules.

COURT RULES

251. In addition the Rules Committee would, within the framework of such provisions of the general code of procedure as are applicable to the Court, make and publish rules for the various divisions and subdivisions of the Court.

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[1] Franks Report, par. 128 at 30.

[2] See Judicature Amendment Act 1930 and Schedule thereto.

RECOMMENDATIONS TO THE ATTORNEY-GENERAL

252. The Committee should be obliged to meet at least once annually and be empowered at any time to make such recommendations to the Attorney-General as it thinks desirable touching the constitution, powers, and functions of the Court or any tribunal or other administrative agency.

APPEALS FROM ADMINISTRATIVE COURT

253. The Franks Committee recommended that all decisions of tribunals should be subject to review by the courts on points of law (but not on fact), and that whatever might be decided as to the scope and methods of appeals to the courts the remedies by way of certiorari, prohibition, and mandamous should continue. The distinction between appeals on points of law and review by the prerogative orders will be discussed in Chapter 15 of this report. Suffice it to say at this point that it is unnecessary to maintain the distinction, and a single method is here proposed. The adoption of one method of review, which involves abandoning the prerogative writs and orders, has the great advantage of simplicity and certainty.

GROUNDS FOR APPEAL

254. The traditional grounds for judicial review of administrative adjudication were well expressed by Professor F. H. Lawson in a memorandum submitted in evidence to the Franks Committee and the following passage merits quotation:

> I have no doubt that the old Common Law principles governing the exercise of judicial functions should as far as possible govern the acts . . . of tribunals constituted under any Act of Parliament . . . . They are, put quite shortly, that a clear duty to exercise jurisdiction must be fulfilled, that jurisdiction must not be exceeded, that powers must not be abused through indulging in malice, by taking extraneous considerations into account or by answering the wrong question and refusing to answer the right one – in other words, that they must be exercised for the purpose intended by the Legislature – that a person who is interested in a case or is likely to be biased should not take part in deciding it, and that any person likely to be adversely affected by a decision should have an opportunity of objecting to it and of putting forward evidence and arguments. . . . To resume, the Common Law forbade neglect of duty, excess of jurisdiction, abuse of power, interest or bias and failure to observe the maxim *audi alteram partem.*[1]

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[1] F. H. Lawson, Minutes of Evidence before Committee on Administrative Tribunals and Enquiries, 9th and 10th Days par. 2 at 330.

In a loose sense all the foregoing matters go to jurisdiction. Further, a tribunal may err by coming to a wrong decision on the facts, law, or merits. The right of appeal here proposed incorporates all the grounds for review referred to by Professor Lawson and includes errors of law.

255. In America these grounds have been codified in the Federal and certain state Administrative Procedure Acts. These acts extend review to decisions in violation of constitutional rights and those unsupported by substantial evidence. The former is not applicable here and the latter is unnecessary since the Administrative Court may make a full review of facts. The grounds here set out, which effectively codify the common law as it applies in England, America, and New Zealand are taken from section 14 (8) of the Massachusetts Act. Full particulars of the provision are set out in Appendix C. Ground (b) has been added out of an abundance of caution.

SPECIFIC GROUNDS OF APPEAL

256. Appeal lies where the Administrative Court decision is:

(a) In excess of the statutory authority or jurisdiction of the Court; or
(b) A wrongful refusal to exercise jurisdiction; or
(c) Based upon an error of law; or
(d) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. (Note: This would include cases where a member of the Court had an interest in the matter before it or the very remote contingency of the Court being actuated by malice.)
(e) Made upon unlawful procedure. (This would include cases where a right of hearing or sufficient hearing was not afforded.)

POWER OF APPEAL COURT

257. The Appeal Court should have power to affirm the decision of the Administrative Court; or to refer the matter back with appropriate directions for further proceedings or consideration by the Court; or to set aside or modify the decision; or to compel any action unlawfully withheld or unreasonably delayed, if it determines that the substantial rights of any party may have been prejudiced on any of the foregoing grounds. The Appeal Court should be required to give due weight to the experience, technical competence, and specialised knowledge of the Administrative Court, as well as to any discretionary authority conferred on it.

The preceding grounds are taken almost verbatim from section 14 (8) of the Massachusetts Act and constitute a remarkably comprehensive power of review. As a safeguard against appeals of a technical nature as, for instance, minor departure from procedural rules, relief is made dependent upon a finding that *substantial* rights of a party may have been prejudiced.

APPROPRIATE APPEAL COURT

258. Almost without exception decisions of existing appeal authorities and boards are final, except on questions of jurisdiction. It is rare to find an appeal or a case stated going from an appeal authority to the Supreme Court, but some appeal authorities may state a case for the opinion of the Court of Appeal on questions of law. Examples are the Trade Practices Appeal Authority and the Land Valuation Court. While the Court of Appeal appears to be preferred to the Supreme Court as an appellate body on questions of law, the Supreme Court has traditionally exercised supervisory powers over jurisdiction and errors of law on the face of the record. It is questionable whether this distinction is a rational one, and in the interests of ensuring consistency and reducing the number of hearings, appeals from all decisions of the Administrative Court should go direct to the Court of Appeal. While this is advanced as a general proposition some exceptions will doubtless be desirable. Tax appeals are one; the Supreme Court has long exercised an appellate jurisdiction in this area and has very considerable experience in it. Moreover it now has original jurisdiction in the more important cases.

259. The Franks Committee considered the question of the appropriate court to which appeals on points of law should lie. After referring to the possible alternatives of the Court of Appeal, the Divisional Court of the Queen's Bench Division, a nominated Judge of the High Court, or the County Court it decided in favour of the Divisional Court. The Committee was influenced by the fact that this Court already exercises general supervision and control (by means of the prerogative orders) over all inferior courts and tribunals. It normally comprises *three* High Court Judges and "is almost invariably presided over by the Lord Chief Justice (which) tends to ensure uniformity of approach and decision".[1] There is no New Zealand counterpart of the Divisional Court, and it might well prove administratively difficult, if not impossible, in view of the heavy burden of work on the Supreme Court, to assemble three Judges (preferably the same) to hear appeals from the Administrative Court. The English experience supports the view that the balance of advantage lies in having a more or less permanent body, as is our Court of Appeal, as the appellate court.

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[1] Franks Report, par. 115 at 27.

FORM OF APPEAL

260. The grounds for appeal set out above include the various matters which may be raised by proceedings for mandamus, prohibition, or certiorari or the equitable remedies of injunction or declaration. It is recommended that all these proceedings should be replaced by a simple uniform method of appeal. It is unnecessary to go into details here, but a suitable method would be by notice of motion containing a concise statement of material facts, grounds for appeal, and the claim for relief. Verifying affidavits should support the motion where necessary, and the respondent should file an answer.

PRIVATIVE CLAUSES

261. These should be replaced. In the case of tribunals of first instance a right of appeal to the Administrative Court should be expressly conferred; this right should be the exclusive remedy whether on questions of jurisdiction, error of law, or the merits generally. Likewise the grounds for appeal set out in paragraph 246 should be the exclusive basis for review of decisions or action of the Administrative Court.

PART IV

14

The Right to a Hearing

INTRODUCTORY

262. So far this report has been concerned with administrative justice as administered by tribunals. But there remains for consideration the vast uncharted sea of administrative decisions made by Ministers, officials, local authorities, and others exercising statutory powers. This part is concerned with the right of persons adversely affected by these decisions to be heard before being deprived of their rights, property, or livelihood.

263. The regular courts of law have traditionally regulated their own proceedings to ensure that parties are afforded a hearing before a decision adverse to their interest is made against them. Proposals have been made in earlier sections of this report to strengthen the procedural requirements of administrative tribunals with the same end in view. But there is an equally urgent need for legislative action to buttress the supervisory jurisdiction of the courts over decisions of officials and other administrative authorities. This need has arisen largely through the partial abnegation of the courts of their historical role in this area. It is possible that the courts, as a result of the recent decision of the House of Lords in *Ridge* v. *Baldwin*,[1] will recover their initiative in this field. This decision is discussed later in this chapter. The present situation can best be understood by a brief review of the changing posture of the courts over the years.

THE PRESUMPTION IN FAVOUR OF A HEARING

264. The right to be heard is one of the two fundamental rules of natural justice; it finds expression in the maxim *audi alteram partem*. This is not the place to describe in detail the origin and development of this rule, but its present standing can be properly understood only if viewed in historical perspective, however brief.

As early as 1615 the Court of King's Bench declared that one James Bagg, a chief burgess of Plymouth, could not be removed from office without first affording him a hearing. Lord Coke ruled that:

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[1] [1963] 2 W.L.R. 935.

> . . . if it appears by the Return, that they have proceeded against him without hearing him answer to what was objected, or that he was not reasonably warned, such removal is void and shall not bind the Party . . . and such removal is against Justice and Right.[1]

A little over a century later, the University of Cambridge was held to have acted unlawfully in stripping Dr Bentley of his degrees without first hearing him in his defence.[2] These are but two of a continuous line of cases in the seventeenth and eighteenth centuries in which the courts insisted that a hearing be granted before persons were deprived of their rights, office, or livelihood.

265. In 1832 the Court of Exchequer[3] considered the powers of a Bishop to require a vicar to appoint and pay a curate to perform duties neglected by the vicar. The statute authorised the Bishop to take this step whenever it should appear to his satisfaction "either of his own knowledge or upon proof of affidavit" that the duties of the parish had been inadequately performed because of the negligence of the incumbent. Notwithstanding the fact that the statute expressly authorised the Bishop to take this step whenever he was *satisfied of his own knowledge* that the vicar had erred in his duties, the Court insisted that the vicar should first be given notice of the charge and an opportunity of being heard in his own defence.

266. With the second half of the nineteenth century came a marked increase in legislation regulating factory, housing, public health, and like matters. The case of *Cooper* v. *Wandsworth Board of Works*[4] decided in 1863 set the judicial tone in this important area. Cooper was employed to build a house in the Wandsworth district and had already reached the second storey when the Board, without giving him any notice, sent workmen at a late hour in the evening and had it razed to the ground. The Board purported to act under a statute which required seven days' notice to be given before any new house was begun and which authorised it to demolish any house erected, or in the course of erection, where no notice had been given. The Court ruled that Cooper should first have been given notice and an opportunity to be heard. One member of the Court, Byles J., stated:

> It seems to me that the Board was wrong whether they acted judicially or ministerially. I conceive they acted judicially because they had to determine the offence, and they had to apportion the punishment as well as the remedy. That being so, a long course of decisions, beginning with Dr. Bentley's case and ending with some

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[1] *James Bagg's* case 11 Coke 93 at 99.

[2] *The King* v. *University of Cambridge* (1723) 1 Str. 557.

[3] *Capel* v. *Child* (1832) 2 Cr. and J. 558.

[4] *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B. (N.S.) 180.

> very recent cases, establish that, although there are no positive words in a statute requiring that the party shall be heard, *yet the justice of the common law will supply the omission of the legislature.*[1]

267. The most authoritative statement of this principle is to be found in the oft-quoted dictum of Lord Chancellor Loreburn in *Board of Education* v. *Rice*. This case, which came before the House of Lords in 1911, was concerned with the appellate functions of a government department but the Lord Chancellor's statement could scarcely have been wider in application:

> Comparatively recent statutes have extended, if they have not originated, a practice of imposing upon departments or officers of state the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter for discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.[2]

268. Had this statement of the *audi alteram partem* rule been liberally applied in all subsequent cases the present uncertainty as to the scope of the rule would not have arisen. After the decision in the *Board of Education* case it could fairly be said that the law presumed in favour of any person whose rights, property, office, or livelihood were likely to be adversely affected by administrative acts or decisions, a right first to be heard. This presumption was expressed in very general terms since obviously it was impossible to lay down categorical rules which could be of universal application to the vast and diverse field of administrative action. But two basic principles had emerged: the first, that notice must be given of any proposed action; the second, that parties affected must be given an opportunity to correct or contradict any statement or information prejudicial to their interests. Clearly this latter requirement meant that parties must be advised of information in the possession of the administration: how else could it be corrected or contradicted? The courts out of an inherent sense of justice refused to distinguish between strictly judicial proceedings on the one hand and admin-

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[1] idem at 194 (emphasis added).

[2] *Board of Education* v. *Rice* [1911] A.C. 179 at 182.

istrative acts on the other. If in either case a citizen's interests were likely to be affected then he was entitled to be heard. In so holding, the courts were motivated not by a desire to judicialise the administrative process but by an instinctive sense of fair play, a sense of "natural justice". It was not material that a particular statute was silent on the question of a hearing, "the justice of the common law will supply the omission of the legislature". Only where the statute expressly dispensed with the need for a hearing did the courts refuse relief. At this point the courts, on their own initiative, had established a firm presumption in favour of a hearing comparable in its effect to the "due process" clause of the American constitution. Every citizen of the United States has a constitutional guarantee, liberally construed by the courts, that he may not be deprived of life, liberty, or property without "due process of law". And "notice and opportunity to be heard are fundamental to due process of law"[1] the United States Supreme Court has decided in a case involving administrative action.

269. Four years after the *Board of Education* decision, the House of Lords retreated from the full implication of Lord Loreburn's ruling. In *Local Government Board* v. *Arlidge*[2] the respondent Arlidge had appealed to the Board against a closing order made by the Hampstead Borough Council. The Board, following its usual procedure, appointed an inspector to hold a public inquiry. On receiving the inspector's report the Board invited Arlidge to submit a further statement in writing, but it refused to disclose the contents of the inspector's report. Arlidge then sought a writ of certiorari to quash the Board's order on the ground (*inter alia*) that the inspector's report had not been disclosed, contrary to natural justice. The Court of Appeal upheld Arlidge's contention, but the House of Lords ruled otherwise. In the leading judgment Lord Chancellor Haldane, while approving the dictum of Lord Loreburn in the *Board of Education* case, nevertheless ruled that the requirements of natural justice were sufficiently met without disclosure of the inspector's report. It has taken 40 years of mounting public pressure, culminating in the Franks inquiry, to remedy this situation. The Franks Committee recommended that parties should have an opportunity to propose corrections in the inspector's report before it is tendered to the Minister, and that the complete report should accompany the Minister's decision.[3] While this recommendation is now followed in practice, no legislative action has been taken, and the law remains where the House of Lords left it in Arlidge's case.[4]

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[1] *Joint Anti-Fascist Refugee Committee* v. *Mcgrath* [341] U.S. 123, 178 (1951).

[2] *Local Government Board* v. *Arlidge* [1915] A.C. 120.

[3] Franks Report, par. 344–345 at 73.

[4] See H. W. R. Wade, *Administrative Law* at 151 and 185.

270. Despite the setback resulting from the Arlidge decision, the English courts continued to insist on a right to a hearing fairly consistently in the period between the two world wars. During the thirties the courts were called on in numerous housing and town-planning cases to maintain the rule and did so. A noticeable reaction set in at the end of the Second World War, however, and this has since persisted. In the *Stevenage Case*[1] natural justice suffered something of a setback when the House of Lords, overruling the Court of Appeal, declared that a Minister, in confirming a draft order designating a new town after a public inquiry had been held and a report submitted to him, was free of all obligations to comply with the rules of natural justice. Lord Thankerton, finding that the Minister had complied with all procedural provisions of the statute, declined to impose any further obligation on the Minister, notwithstanding the far-reaching effect of his decision on the inhabitants of Stevenage. The remarkable feature of the decision is the emphasis on a completely literal interpretation of the statute. Not a word appears of any common law presumption in favour of citizens adversely affected by administrative action. The decision rests entirely on a strict construction of the New Towns Act.

271. In 1950, only three years after the *Stevenage* decision, the Privy Council on an appeal from Ceylon, ruled that a textile dealer could be deprived of his licence, and inferentially of his livelihood, without first being heard on the question. Lord Radcliffe, in delivering judgment, advised that their Lordships would not find it helpful to reconsider the immense range of reported cases in which certiorari had been granted by English courts; on the contrary they looked only to the language of the regulation empowering the controller to cancel a licence and finding nothing there or "in the context or conditions of his jurisdiction that suggests that he must regulate his action by analogy to judicial rules",[2] held that the licence might be revoked without notice or a hearing. So much for the common law presumption so boldly affirmed by Lord Coke in 1615 and re-echoed in case after case until it found its most complete expression in the *Board of Education* case some 300 years later.

NAKKUDA ALI
[1951]
(See de Smith
[illegible] p 567

THE NO-PRESUMPTION DOCTRINE

272. Needless to say, British and Commonwealth commentators have deplored this retrograde move on the part of the highest English courts.[3] How does the law stand in New Zealand? Along

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[1] *Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87.

[2] *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66 at 79.

[3] See, e.g., H. W. R. Wade, *Administrative Law*, 162–164; S. A. de Smith, *Judicial Review of Administrative Action*, 130–134; and D. M. Gordon Q.C., "The Cab-Drivers licence Case" (1954) 70 L.Q.R. 203 (in which the decision in *The Queen* v. *Metropolitan Police Commissioner* [1953] 1 W.L.R. 1150 is also criticised).

with those of some other Commonwealth countries, our courts are credited by British writers with maintaining a sturdier respect for the earlier law; they point with generous approval to two New Zealand decisions in particular as being soundly based and free of the vice of the Ceylon case. But while the decision on the merits in both the *Okitu*[1] and *Licensed Victuallers*[2] cases can only be applauded, each confirms the demise of the presumption in favour of a hearing. Cooke J., in *Okitu*, in a judgment concurred in by Northcroft J., makes this clear:

> It was urged upon us for the respondent that . . . "a person is *prima facie* subject to a duty to act judicially in performing a statutory duty or exercising a statutory power if the performance or exercise will impose a new legal liability on another person or will interfere with the legal rights of another person" . . . I respectfully think, however, that what was said by the Privy Council in Nakkuda Ali's case . . . shows that, in approaching the constating instrument, whether it is a statute or a regulation, for the purpose of ascertaining whether there is a duty to act judicially, *there is no presumption one way or the other.*[3]

BULLER HOSPITAL BOARD

273. That there is, in the view of the New Zealand Court of Appeal, no presumption in favour of a hearing was unanimously confirmed by all members of our Court of Appeal in the *Buller Hospital Board* case decided in 1959. After considering the argument for the appellant based "on the broad proposition that no person was to be deprived of civil or statutory rights upon any ground affecting his conduct without being afforded an opportunity of being heard in accordance with the rules of natural justice unless the statute . . . clearly authorised a course to the contrary" and a line of authority extending from Dr Bentley's case on, Cleary J. declared:

> It has become settled, however, since the Courts have been concerned to consider the procedure of administrative tribunals and similar authorities, that the question is one of interpretation in each case *with no presumption one way or another.* So much is clear from the decisions of this Court in the Okitu and Licensed Victuallers' cases, and it is to be noticed that, in saying in those cases that there was no presumption one way or the other, the court was only founding itself upon the approach to interpretation which had been adopted both in the House of Lords and in the Privy Council.[4]

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[1] *New Zealand Dairy Board* v. *Okitu Cooperative Dairy Co.* [1953] N.Z.L.R. 366.

[2] *New Zealand United Licensed Victuallers Assn.* v. *Price Tribunal* [1957] N.Z.L.R. 167.

[3] Supra at 419 (emphasis added) and to the same effect see Finlay J. at 401 and 403.

[4] *Buller Hospital Board* v. *Attorney-General* [1959] N.Z.L.R. 1259 at 1310 (emphasis added). For similar views see per Gresson P. at 1287–1289 and North J. at 1297. See also *Modern Theatres Ltd.* v. *Peryman* [1960] N.Z.L.R. 191, 197–198.

REVIVAL OF THE PRESUMPTION?

274. The very recent decision of the House of Lords in *Ridge* v. *Baldwin*[1] may prove to be a landmark in the development of Judge-made administrative law. It is too early yet to assess its future effect but it could conceivably lead to a revival of the presumption in favour of a hearing. Ridge, the appellant, was summarily dismissed by the Watch Committee from his position of chief constable of Brighton. Although the Watch Committee heard representations from his solicitor it neither detailed specific charges against Ridge nor gave him an adequate opportunity to answer them. The High Court and Court of Appeal declined to hold the action of the Watch Committee unlawful. The House of Lords by a majority of four to one reversed the Courts below and held the decision of the Watch Committee, in the circumstances, to be null and void. Lords Reid, Morris, and Hodson ruled that the appellant could be dismissed by the Committee only on grounds stated in section 191 (4) of the Municipal Corporations Act 1882, and, as they dismissed him on the ground of neglect of duty, they were bound to observe the principles of natural justice by informing the appellant of the charges made against him and giving him an opportunity of being heard, and that they had not done. Lord Reid expressly disapproved the decision of the Privy Council in the *Nakkuda Ali* case; Lord Hodson distinguished it; Lords Morris and Devlin did not refer to it while Lord Evershed expressly approved it. The judgment of Lord Reid contains a lengthy and comprehensive review of the cases from *James Bagg* on and constitutes a vigorous reaffirmation of the presumption in favour of a hearing. Only time will tell whether the courts both here and in Britain will follow the lead given by Lord Reid and *Nakkuda Ali* will fall into the limbo of forgotten cases. The fact that only one Law Lord was prepared expressly to disapprove *Nakkuda Ali* prevents any confident prediction that this will in fact occur. The New Zealand Court of Appeal, in *Corbett* v. *Social Security Commission*,[2] has left the door open to follow a later decision of the House of Lords in preference to a decision of the Privy Council but it cannot be predicated with any certainty at this stage that it will now abandon the no-presumption doctrine and adopt the more positive approach exemplified in Lord Reid's judgment.

IS THE PRESENT LAW SATISFACTORY?

275. As the law stands, no citizen can be sure of his rights when he becomes subject to the jurisdiction of the administration or others exercising statutory powers. It has recently been said by one member

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[1] [1963] 2 W.L.R. 935.

[2] [1962] N.Z.L.R. 878.

of our Court of Appeal that "(it) is now a commonplace that the decisions of administrative tribunals frequently interfere with legal rights, but this in itself is not a ground for requiring the tribunal to act judicially".[1] If this is true of administrative tribunals in the strict sense it is equally true of officials and statutory authorities generally, and reveals an alarming state of affairs. In the *Okitu*, *Licensed Victuallers'*, and *Buller Hospital Board* cases the Court of Appeal could rule on the propriety of administrative action only after a most minute and searching scrutiny of the relevant regulations or statute together with a detailed examination of the "conditions and circumstances under which and in which the jurisdiction was exercised". In other recent cases[2] the Supreme Court has been involved in the same protracted and exacting task. In no case is the Court now aided by a presumption that the administrative authority is to act fairly rather than arbitrarily or oppressively. Few would dispute that this situation should be remedied.

A STATUTORY RIGHT TO A HEARING

276. The courts have consistently recognised, when imposing on the administration and statutory bodies a duty to "act judicially", that they cannot be expected to adopt court procedure. Administrative action would be seriously frustrated by any such requirement. In a recent case involving the procedure followed by the Vice-Chancellor of the University of Ceylon in dismissing a student for obtaining prior knowledge of an examination paper, the Privy Council surveyed the requirements of the principles of natural justice:

> Those rights have been defined in varying language in a large number of cases covering a wide field. Their Lordships . . . would observe that the question whether the requirements of natural justice have been met by the procedure adopted in any given case must depend to a great extent on the facts and circumstances of the case in point. . . .
>
> . . . From the many other citations which might be made, their Lordships would select the following succinct statement from the judgment of this Board in *De Verteuil* v. *Knaggs*: "Their Lordships are of the opinion that in making such an enquiry there is, apart from special circumstances, a duty of giving to any person against whom the complaint is made a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice."[3]

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[1] Per Cleary J. in *Buller Hospital Board* v. *Attorney-General* (*supra*) at 1310.

[2] See, e.g., *Low* v. *Earthquake and War Damage Commission* [1959] N.Z.L.R. 1198 and *Modern Theatres Limited* v. *Peryman* (*supra*).

[3] *Ceylon University* v. *Fernando* [1960] 1 W.L.R. 223.

The Privy Council also gave its general approval to the passage from the judgment of Lord Loreburn in the *Board of Education* case already cited in paragraph 267. In cases then where the courts hold the administration under a duty to afford a hearing, the nature of the hearing will depend upon a variety of considerations. It will always, however, include notice of the proposed action and the disclosure of the information in the hands of the administration with an appropriate opportunity to correct or contradict it.

277. Until the decision in *Ridge* v. *Baldwin* it seemed highly unlikely that our courts would attempt to reassert their earlier undoubted power to "supply the omission of the legislature" by applying the common law presumption. Even now the position remains in doubt and may well take years to resolve. Nor is there any guarantee that in the end the result will be satisfactory. The case for legislative action to put the matter beyond doubt remains very strong. In what circumstances should the Legislature impose the requirement of a hearing? The American "due process" clause extends to life, liberty, or property and thus governs the procedure of regular courts as well as the administration. We may safely leave questions of life and death and the liberty of the subject (speedily reviewable on habeas corpus) to the regular courts. But the powers of the administration and statutory authorities extend beyond "property" in its strictly legal sense. The proposed legislative provision should therefore stipulate that any person whose *rights, property, or livelihood* are adversely affected by administrative action or the exercise of statutory powers should first be entitled to a hearing.[1] To such a requirement there must obviously be exceptions. American courts have recognised this in construing the "due process" clause. "Of course, emergency is complete justification (to summary action). When the building is burning or contagion spreading or putrid poultry is about to be sold, action must be immediate, leaving adjustment of rights for a later day."[2] If, in other cases, the Legislature considers that the paramountcy of the public interest necessitates the citizen being treated unfairly, it should specifically exempt the administrative authority from the obligation to grant a hearing.

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[1] For somewhat similar proposals see H. W. R. Wade, Minutes of Evidence before Committee on Administrative Tribunals and Enquiries, Days 13–14 at 547. Acknowledgment is gratefully made to Professor Wade for the many constructive suggestions made by him in the course of his evidence before the Franks Committee. See also *Rule of Law*, A Study by the Inns of Court Conservative and Unionist Society (1955) at 39–41 placed in evidence before the Franks Committee.

[2] Davis, " The Requirement of the Opportunity to be Heard in the Administrative Process " 51 Yale Law Journal, 1093, 1132 (1942) cited by B. Schwartz, *American Administrative Law*, 118.

278. An important question remains outstanding. Who is to determine what is an adequate hearing in any particular case? As the courts have recognised, it is impossible to formulate precise rules to cover the immense range of administrative activity. In most cases, no doubt, administrators will evolve suitable procedures without difficulty. If, however, in any particular case no hearing, or no adequate hearing, is afforded an aggrieved citizen, then he should have a right of appeal. If an Administrative Court is established the appeal should lie to the General Division of the Court. This division, it will be recalled, comprises the Chief Judge of the Court, a person experienced in central or local government service (depending on the nature of the case being considered), and a representative of the public. It should be especially suited to determine appeals of this nature. On appeal, the Court should have power to determine whether a hearing was required, and if so, the adequacy of the hearing afforded. It should be left largely free to fashion for itself the standards appropriate in any given case or class of case. A further right of appeal, limited to whether the law requires a hearing, should lie to the Court of Appeal.

279. The foregoing proposals are somewhat similar to the practice of the much lauded Conseil d'Etat of France. This unique body, scornfully denigrated by Dicey and his contemporaries, is now recognised as ensuring a greater measure of administrative justice than is generally found in British countries.[1] Professor C. J. Hamson, in his Hamlyn Lecture, has described the practice of the Conseil d'Etat in this way:

> . . . Though in France, as much as in England, the administrator when taking a lawful administrative decision is *not normally* required to give notice of his intention and to hear objection from all persons who might eventually be affected by the decision – to impose such a duty on the administrator is impossible – still the Conseil d'Etat has for some time now begun to put upon the administrator (still acting as such and not upon the pretence that he has magically become a tribunal or quasi) a duty to hear persons specifically and immediately to be affected by a decision *before* reaching his decision. . . . (G)ranted that the administrator had not the character of a judge, should the administrator reasonably have appreciated that there was in this case a duty upon him to "hear" the plaintiff before taking this decision? If the answer is yes, then the Conseil d'Etat as the person competent to determine the standard of behaviour required of the *administrator* will quash the decision taken without hearing the plaintiff. . . .[2]

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[1] See Sir Alfred Denning (now Lord Denning), *Freedom under the Law,* at 79–80.

[2] C. J. Hamson, *Executive Discretion and Judicial Control,* 176–177.

LICENCES

280. In the *Nakkuda Ali* case the Privy Council decided that the controller of textiles could cancel a dealer's licence without a hearing, and that in so doing he was not affecting any rights but merely "taking executive action to withdraw a privilege". This decision was shortly after followed by the *Cab-driver's* case [1] in which the Divisional Court presided over by Lord Chief Justice Goddard ruled that the Metropolitan Police Commissioner could withdraw a London cab driver's licence without granting a hearing of any kind. While in a strictly legal sense the licence in question was more akin to a privilege than a right, its cancellation would inevitably have a drastic effect on the livelihood of the licensee. And even though as a matter of law such a licensee may have no property rights in his licence, nevertheless it is a valuable asset. Despite these considerations the courts were prepared to hold that such licences could be revoked without any hearing. In most of the states of America the courts have likewise invoked the privilege concept to deny a right to a hearing where licences of various kinds have been at stake. A leading American commentator has stated this to be "one of the most prominent areas of weakness in all judge-made administrative law". [2] Yet in a New York case [3] in which the facts were remarkably similar to those of the English *Cab-driver's* case, the six Judges of the New York Court of Appeals ruled that the interest of a taxi driver in a taxicab licence is a right of great value and similar to rights which have been held to be property rights. The Court also held that although the relevant statute empowering the hack bureau and the commissioner to suspend or revoke a taxicab driver's licence does not expressly provide that those licences may be withdrawn only upon notice and an opportunity to be heard, it is essential that they should afford a hearing. Where the exercise of a statutory power adversely affects property rights, as the Court held it to do in this case, the requirement of notice and hearing will be implied by the courts where the statute is silent.

281. The legislation proposed earlier in this chapter extends the right to a hearing to any person whose "rights, property, or livelihood" are adversely affected by administrative action. The disparate views on the true nature of a taxicab licence taken by the English and New York courts illustrates the difficulty which might arise in construing this provision. If, as is possible, the privilege concept is adopted, the requirement of a hearing may not extend to licences, and the effectiveness of the provision would be greatly impaired. To remove all doubts a further provision should be enacted dealing expressly with licences.

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[1] *The Queen* v. *Metropolitan Police Commissioner* [1953] 1 W.L.R. 1150.

[2] Davis, 1 *Administrative Law Treatise* at 493.

[3] *Hecht* v. *Monaghan* 307 N.Y. 461 (1954).

282. A useful precedent, meriting quotation in full, is to be found in the Massachusetts Administrative Procedure Act (section 13).

> Section 13. "*Licence*", as used in this section, includes any licence, permit, certificate, registration, charter, authority or similar form of permission required by law.
>
> Except as otherwise provided in this section, no agency shall revoke or refuse any licence unless it has first afforded the licensee an opportunity for hearing in conformity with sections ten, eleven, and twelve. If a licensee has, in accordance with any law and with agency regulations, made timely and sufficient application for renewal, his licence shall not expire until his application has been finally determined by the agency. Any agency that has authority to suspend a licence without first holding a hearing shall promptly upon exercising such authority afford the licensee an opportunity for hearing in conformity with sections ten, eleven, and twelve.
>
> This section shall not apply—
>
> (i) where a provision of the General Laws expressly provides that an agency is not required to grant a hearing in regard to revocation, suspension or refusal to renew a licence as the case may be; or
>
> (ii) where the agency is required by any law to revoke, suspend or refuse to renew a licence, as the case may be, without exercising any discretion in the matter, on the basis of a court conviction or order; or
>
> (iii) where the revocation, suspension or refusal to renew is based solely upon failure of the licensee to file timely reports, schedules, or applications, or to pay lawfully prescribed fees, or to maintain insurance carriage as required by any law or by regulation.[1]

It will be noted that this provision does not apply to applications for the *grant* of a licence. In those cases in New Zealand where a tribunal has been set up to control licensing a hearing is normally granted on applications for licences as well as revocations. Although an applicant for a licence will generally have less at stake than a licensee faced with the revocation or suspension of a licence of the same kind, justice would be better served if a hearing were required in all cases. If, for instance, a prospective home owner applies to a local authority for a permit to build a house, his application ought not to be declined without a hearing. It is recommended therefore that a provision along the lines of the Massachusetts section, but extended to include applications for licences, should be enacted. Exemptions in appropriate cases can be provided for in particular Acts.

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[1] " Agency " is defined by section 1 (2) of the Act as including " any department board, commission, division or authority of the state government or subdivision of any of the foregoing, or official of the state government authorized by law to make regulations or to conduct adjudicatory proceedings . . . . "

PART V

15

Judicial Review of Administrative Decisions

INTRODUCTORY

283. Few administrative decisions (that is, decisions of central or local government officials and others exercising statutory powers) are subject to appeal. In some cases representations may be made to a Minister of the Crown, or, if a Minister's decision is impugned, to Parliament. But Parliament can be expected to debate the merits of relatively few administrative decisions, and then not necessarily with anything like full knowledge of the facts. The appointment of the Ombudsman bears testimony to the present inadequacy of review, judicial or otherwise, of administrative decisions.

SCOPE OF EXISTING JUDICIAL REVIEW

284. The courts have traditionally exercised a limited surveillance over those exercising statutory powers. The scope of the review has, however, been largely shaped by the nature of the remedies available to bring administrative acts or omissions before the courts. Unfortunately these remedies, the prerogative writs of certiorari, prohibition, and mandamus, have become so encrusted with historical limitations as to render them only partly effective in dealing with modern problems. While the action for a declaration shows promising signs of filling some of the gaps left by the prerogative writs, its future development in some areas remains uncertain.

285. Broadly speaking, the supervision of the courts extends to ensuring that administrators (in the widest sense) do not exceed their statutory powers. These powers will be exceeded when the administrator does something for which there is no warrant in the statute or, technically speaking, acts *ultra vires*. Alternatively, the administrator may have legal power to take certain action but in the particular case may exercise his power in bad faith or for an improper purpose, or on irrelevant or extraneous considerations, or without taking into account relevant considerations. In very exceptional cases an administrative decision will be invalidated on the grounds that it is grossly unreasonable. In all these cases the administrator will be held to have acted without or in excess of his statutory authority.

286. In addition, if a statutory authority, acting within its jurisdiction, makes an error of law in the course of reaching a particular decision, and this error is "apparent on the face of the record", then the court may quash the decision. If, however, the error of law does not so appear, the courts are generally powerless to intervene. Since few administrative authorities are obliged to give reasons for their decisions, it becomes extremely difficult, if not impossible, to challenge them. In the absence of reasons there is generally no way of knowing whether the administrator correctly interpreted the relevant legislation, or whether he took into account extraneous considerations or omitted to take into account relevant considerations, or otherwise failed to comply with the law.

287. Nor does judicial review of administrative action, in the absence of a right of appeal, extend to a review of the merits of the decision. The court must confine its attention to the legality of the act, not its fairness. It cannot rule on alleged errors of law or fact unless the error goes to jurisdiction or constitutes an error of law on the face of the record.

288. In some cases, as has been seen, the courts will intervene if a hearing has not been afforded; their willingness to do so, however, has been constrained not only by the virtual abandonment of the common law presumption in favour of a hearing, but by the historical limitations surrounding the issue of the writ of certiorari. A failure to grant a hearing is often characterised as a jurisdictional error for the purpose of facilitating review, although in reality it is more in the nature of a procedural error within jurisdiction.

289. Two other factors limit the scope of review by the courts. These are, first, the increasingly common practice on the part of the Legislature of granting statutory powers in subjective terms, and, secondly, Crown privilege as invoked by Government Departments and Ministers of the Crown.

SUBJECTIVE DISCRETIONARY POWERS

290. It is usual to classify discretionary powers as being "objective" or "subjective". Thus, if as a condition precedent to the exercise of a given power an administrator must "have reasonable grounds to believe" that such and such is the case, then the existence of those grounds may be challenged before the courts who must be satisfied that they exist, not merely in the mind of the administrator, but in actual fact.[1] If, however, as is now so frequently the case, the authority is empowered to take a specified course of action "if in his opinion" or "if he is satisfied" or "if it appears" that a given state of affairs exists, then the authority's decision as to whether the

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[1] *Nakkuda Ali* v. *Jayaratne* (*supra*).

stipulated state of affairs exists is final and cannot be reviewed by the courts. If it could be shown that there was *no* evidential basis for the authority's conclusion the court might intervene;[1] but in practice this would be hard to establish. Other statutes empower an authority to take such action or to impose such conditions "as it thinks fit" in relation to the specified matter. Here again review is very limited, as Lord Greene in a leading case has shown:

> When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognises certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. . . . The exercise of such a discretion must be a real exercise of discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matter which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard these irrelevant collateral matters. . . .[2]

Where a Minister or other administrative authority is empowered to take a specified course of action "if satisfied that it is necessary in the public interest" so to do, a statement that the Minister or authority was so satisfied is, in the absence of bad faith, binding on the courts. There are no doubt situations where a virtually unchallengeable power of this kind is justified; in an extreme case it could be challenged in Parliament. But in some, probably in many, cases, the Legislature could usefully qualify the grant of statutory authority by a requirement that there exist reasonable grounds for its exercise or for the belief that conditions precedent to its exercise exist or have arisen. Such action would help to make judicial review more effective.

It is worth noting that in America the courts have taken a more robust view of their powers. Thus "words of discretion such as 'in his judgment' or 'when he is satisfied' are reasonably clear on their face and seem susceptible of consistent interpretation in favour of unreviewability. But here, as elsewhere, the courts tend to mould their own law of reviewability, irrespective of statutory provisions concerning reviewability."[1]

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[1] *Ross-Clunis* v. *Papadopoullus* [1958] 1 W.L.R. 546 at 560.

[2] *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223, 228–229.

CROWN PRIVILEGE

291. Public and judicial discontent with the wide ambit of Crown privilege is mounting, and not, it seems without some justification. No one disputes the right of the Crown to claim privilege from disclosure of any documents or information relating to national defence or security. It is less easy to see the justification for the withholding of documents on a "class" basis. The claim is that "the document belongs to a class which, on grounds of public interest, must be withheld from production" in order to promote and secure "freedom and candour of communication with and within the public service".[2] When Crown privilege is claimed on this basis it must inevitably work injustice on a litigant challenging some administrative act; it will also, if less frequently, hinder the Crown in its defence since in practice when the claim is made it covers all documents whether favourable or unfavourable. It is highly unsatisfactory to a litigant faced with a claim of Crown privilege to have his dispute with the Government decided by the court on the basis of only a partial, indeed in some cases an extremely limited, knowledge of the vital facts in issue. At present the interests of justice are heavily outweighed by the interests of Government. Parliament may hesitate to legislate precise rules, but it would appear possible to devise a formula that would go some way towards redressing the balance in favour of the citizen. The recent decision of the Court of Appeal in *Corbett* v. *Social Security Commission*[3] should have a liberalising, or at least cautionary, effect. The Court by a majority ruled that the New Zealand courts (unlike those in England) still possess the power to overrule a ministerial objection to the production of documents in respect of which privilege is claimed if they think it right to do so, but this is a power to be held in reserve and not to be lightly exercised. It was not in fact exercised in this case.

PRESENT METHODS OF JUDICIAL REVIEW

292. There is considerable dissatisfaction with existing methods of judicial review of administrative action. The prerogative writs or orders of certiorari, prohibition, and mandamus remain the principal means of securing review, supplemented with increasing frequency in New Zealand by an alternative prayer for a declaration. This additional remedy is sometimes claimed as a safeguard, in the

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[1] Davis, 4 *Administrative Law Treatise* at 85.

[2] *Duncan* v. *Cammell, Laird, and Co. Ltd.* [1943] A.C. 624.

[3] [1962] N.Z.L.R. 878 and see also *Merricks* v. *Nott-Bower* [1964] 2 W.L.R. 702.

fear that unforeseen technical difficulties may defeat the claim for a prerogative writ. The American states have inherited from the English common law the prerogative remedies (known as "extraordinary remedies"), and they have caused no less difficulty and dissatisfaction there than in England and New Zealand. Professor K. C. Davis in his authoritative American treatise on administrative law has written:

> An imaginary system cunningly planned for the evil purpose of thwarting justice and maximising fruitless litigation would copy the major features of the extraordinary remedies.
>
> The lines are moved about through discussions of such concepts as judicial, non-judicial, discretionary and ministerial. These concepts are acutely unfortunate not only because they defy definition but because of the complete folly of using any concepts whatever to divide one remedy from another. Nothing is accomplished by holding that certiorari is the wrong method of reviewing unjudicial action, that mandamus will not reach discretionary action. . . . *The cure is easy.* Establish a single simple form of proceeding for all review of administrative action. Call it petition for review. Get rid of extraordinary remedies as means of review. Focus attention then on the problems having significance – whether, when and how much to review.[1]

Lord Denning, in delivering the Hamlyn Lectures in 1949, stressed that the British "procedure for securing our personal freedom is efficient, but our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for winning of freedom in the new age. They must be replaced by new and up-to-date machinery, by declarations, injunctions, and actions for negligence."[2] Misgivings as to the effectiveness of the prerogative remedies arise from a number of factors. Among these are the historical restriction on the issue of certiorari and prohibition to bodies held to be acting in a judicial capacity, doubt as to whether certain defects in the exercise of discretionary powers go to jurisdiction and hence are amenable to certiorari, and uncertainty as to the scope of mandamus. Although the action for a declaration is becoming increasingly common, owing in large part to the defects in the other remedies, doubt remains as to its scope. One English writer has queried whether a declaration will be granted when "nothing more is alleged than error on the face of the record",[3] or the effectiveness of a declaration in such circumstances if the tribunal has no power to rescind or vary its original determination. The advantage of certiorari, when available, is that the defective decision can be quashed or rendered a nullity. A declaration can never have this effect. Moreover it is doubtful whether a declaration will lie "against a statutory tribunal in respect of errors that are not redressable by certiorari".[1]

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[1] Davis, 3 *Administrative Law Treatise* at 388–389.

[2] Sir Alfred Denning, *Freedom under the Law* at 126.

[3] S. A. de Smith, *Judicial Review of Administrative Action* at 408–410.

PROPOSALS FOR REFORM

293. Lord MacDermott, Lord Chief Justice of Northern Ireland, in the course of his Hamlyn Lectures on "Protection from Power under English Law", after discussing the prerogative remedies, the action for a declaration, and the *audi alteram partem* rule, turned to *procedural reform.* His proposals merit attention:

> The Committee on Ministers' Powers thought that, in its procedure, the Supervisory jurisdiction of the High Court was "too expensive and in certain respects archaic, cumberous and too inelastic". This comment is still in point, but if reform is to yield the best results it should not be confined strictly to procedure. *As a first step* those limitations in the scope of the prerogative remedies that are historical attachments rather than anything else, might be removed. For example prohibition and certiorari could well be extended to administrative acts and decisions which are not of a judicial nature so that, there too, what is wrong in law or done without authority could be quashed in a summary manner. *Or, again,* the High Court might be empowered, in the exercise of its prerogative jurisdiction, to direct the Minister or department concerned to state the reasons for a decision whenever these do not appear on the exhibited documents. *After that a process of simplification or assimilation* might be brought to bear on the machinery of resort to the courts so that the moving party could, *by a simple summary procedure,* obtain whatever appropriate relief the court had power and thought fit to give, be it to quash, to forbid or to make a declaration of rights. . . .[2]

Although stated cautiously and conceived as a gradual process, what Lord MacDermott ultimately envisages is the substitution of a "simple summary procedure" for the prerogative writs and other existing methods of review. His proposal is, in essence, identical with that recommended by Professor Davis as appropriate for American states. It is questionable whether any useful purpose is served by meddling in a piecemeal fashion with the existing prerogative remedies in an attempt to improve them. They have become so encrusted with traditional restrictions that it can only be a matter of conjecture as to how the courts will interpret any statutory extensions. Nor is it easy to justify the retention of as many as four or five separate procedural remedies when one simple means of relief could readily and with advantage be substituted.

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[1] idem at 409.

[2] Lord MacDermott, *Protection from Power under English Law*, 95–96 (emphasis added).

NEW YORK STATE REFORMS

294. In New York State the writs and orders of certiorari, mandamus, and prohibition were abolished in 1937 and a single composite form of relief substituted.[1] "(A)s was done one hundred years ago with the forms of action, a litigant hereafter need only set forth his facts and his prayer for relief and such relief as is proper may be given to him."[2] Instead of requesting a certiorari order and so on, a petitioner merely asks for an order compelling certain action or inaction by a particular body, or modifying or annulling a determination made by some body or official. But the New York Act stopped short of amending the substantive law with the result that though a litigant can no longer be ensnared by technical difficulties the remedies available are still governed by the principles previously applicable to certiorari, prohibition, or mandamus. Despite this weakness the New York reforms have proved very successful.[3]

MASSACHUSETTS REFORMS

295. The Massachusetts Administrative Procedure Act 1954 effects a partial repeal of the extraordinary remedies. Section 14 of the Act governs judicial review of adjudicatory proceedings of state agencies and officials. Review follows the statutory form if one is provided by a particular statute, but where no statutory form of review or appeal is provided or the only statutory form of review is by extraordinary writ, judicial review is by way of petition for review in terms of section 14 of the Act. To that extent, therefore, the extraordinary remedies are abolished and the procedure simplified. The Act does not, however, extend to adjudicatory proceedings of local authorities nor to administrative action other than "adjudicatory proceedings". Since it is not always easy to know whether a particular procedure falls within the definition of "adjudicatory proceedings" parties can still find themselves pursuing relief by the wrong procedure and being frustrated accordingly.[4]

296. It was not the intention of the draftsmen of the Massachusetts Act to maintain this dichotomy. Section 15 of the original draft[5] of the legislation provided in effect that all administrative

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[1] N. Y. Laws 1937, Ch. 526.

[2] 4 N. Y. Jud. Council Rep. 19 (1938) cited by N. L. Goldstein, "Judicial Review of Administrative Action Through Article 78 of the Civil Practice Act" 2 Syracuse L. Rev. 199– at 201.

[3] See generally N. L. Goldstein, 2 Syracuse L. Rev. 199–209.

[4] Compare *Hayeck* v. *Metropolitan District Commission* 335 Mass. 372 with *Matthewson* v. *Contributory Retirement Appeal Board* 335 Mass. 610.

[5] The Commonwealth of Massachusetts, Draft of an Act Providing for the Improvement of the Administration of Justice by Prescribing Fair Administrative Procedures, *House*— No. 2766 (1954).

action of any board, commission, department, or officer of the state or any of its political subdivisions (that is, all local authorities) should be subject to review by way of petition and that the writs of certiorari and mandamus were not to be used. Section 17 of the draft is particularly interesting; it prescribed the procedure to be followed where administrative action had been taken without any hearing and where there is no formal record. Subsection (i) provided that:

> (i) Within forty days after service of a copy of the petition for review upon the agency, or within such further time as the court may allow, the agency shall file with the court and serve upon petitioner an answer which shall contain proper denials and statements of affirmative matter, *including a statement of the reasons* for which the agency took the action under review, and *the pertinent and material facts* in support of these reasons. The agency shall file with its answer a copy of the record of any proceedings had, if a record has been made. (Emphasis added).

The proposed powers of the court are very similar to those under section 14 when agency adjudicatory proceedings are under review, but it is convenient to quote them here:

> (5) The Court may affirm the action of the agency, or the court may set aside or modify the action, or compel any action lawfully withheld or unreasonably delayed if it determines that the *substantial* rights of any party may have been prejudiced because the agency action or failure to act is:
> (a) In violation of constitutional provisions; or
> (b) In excess of the statutory authority or jurisdiction of the agency; or
> (c) Based upon an error of law; or
> (d) Made upon unlawful procedure; or
> (e) Unsupported by substantial evidence; or
> (f) Unwarranted by facts found by the court on the record as submitted or amplified under paragraph (4) of the section in those circumstances where the court is constitutionally required to make independent findings of fact; or
> (g) Arbitrary or capricious, an abuse of discretion or otherwise not in accordance with law.
>
> The court shall make the foregoing determinations upon consideration of the entire record, or such portions of the record as may be cited by the parties. The court shall give due weight to the experience, technical competence and specialised knowledge of the agency, as well as to the discretionary authority conferred upon it.

297. Unfortunately sections 15, 16, and 17 of the draft legislation were omitted from the statute when passed because, prior to the introduction of the Bill, there had been insufficient time for consultation with the many local authorities who would have been affected.

Rather than delay the passage of the Bill these sections were dropped.[1]

ERRORS OF LAW

298. As has been seen, the courts have a very restricted power to review errors of law made by administrative authorities. If errors of law are made by officials or bodies required to act judicially and they "appear on the face of the record" they are reviewable; otherwise it is extremely difficult to obtain satisfactory redress. The Massachusetts draft provides for review of all errors of law and it is recommended that this should be the case here. There may be exceptional cases where the Legislature considers the administrative authority should have power to determine questions of law without any right of review. In any such case the Legislature should specifically exclude judicial review and declare the administrative decision on questions of law to be unchallengeable.

REASONS FOR ADMINISTRATIVE DECISIONS

299. Officials and other statutory authorities frequently make decisions without giving any or any sufficient reasons. While no useful purpose would be served by requiring administrative authorities to give reasons for all decisions which adversely affect citizens (administration might well grind to a standstill if this obligation was imposed), yet in the relatively few cases in which an aggrieved individual desires to have a decision reviewed, it should be possible for him to obtain a written statement of the relevant facts and reasons on request. The Massachusetts draft required the agency in its answer to include a statement of reasons and the pertinent and material facts supporting those reasons. It is questionable whether an aggrieved person should first be required to issue review proceedings before he can obtain a proper statement of reasons. If these were supplied on request *and the administrator were bound by his statement*, the citizen would be in a position to judge whether proceedings were justified. In some cases at least the supply of reasons would end the dispute. Here again, a hard-and-fast rule requiring reasons to be supplied on request in all cases may not be practicable; in some cases the Legislature might find it necessary to confer a discretion on the administrator, in others it might leave the matter to be settled by the General Division of the Administrative Court on application of either the party or the administrator.

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[1] See generally Curran and Sacks, " The Massachusetts Administrative Procedure Act " 1957 B. U. L. Rev. 70.

SUMMARY OF PROPOSED REFORMS

UNIFORM PROCEDURE

300. It is recommended that the prerogative writs of certiorari, prohibition, and mandamus be abolished as the means of judicial review of administrative action. In their stead, and in the place of the actions for injunctions and declarations there should be substituted a simple uniform method of review. If possible the Legislature should avoid leaving the writs to operate in certain areas and the simplified procedure in others. Lord MacDermott adverted to this:

> If the supervisory jurisdiction of the High Court comes to be overhauled on these or other terms it would, I think, be unfortunate if the inferior courts – such as courts of summary jurisdiction and quarter sessions – in respect of which the jurisdiction originated were left out of account or dealt with separately. The underlying principles are the same, and to have two supervisory codes instead of one might lead in time to a divergence of treatment that could end with the executive having a law of its own and being no longer subject to the law of the land. . . .[1]

It may be thought desirable to leave the prerogative writs intact, in the meantime at least, as a means of review of the Magistrates' Courts when exercising, or purporting to exercise, their civil or criminal jurisdiction, although there appears to be no imperative reason for so doing. The Supreme Court could continue to exercise its supervisory jurisdiction in this area by means of the simplified procedure.

GROUNDS FOR REVIEW

301. The following grounds in effect codify and, to a limited degree, extend the existing grounds for review under the prerogative writs. It should be stressed that all rights under the old remedies are preserved. By making all decisions based upon an error of law reviewable, whether or not the error of law appears on the face of the record, certain existing limitations and difficulties are removed. Administrative decisions (in the widest sense) should be subject to review where they:

(a) are in excess of statutory jurisdiction or authority; or
(b) constitute a wrongful refusal to exercise statutory authority or jurisdiction; or
(c) are based upon error of law; or
(d) are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law (NOTE: this would include cases where the administrative act or decision was grossly unreasonable); or

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[1] Lord MacDermott, *Protection from Power under English Law* at 97.

(e) are made upon unlawful procedure (NOTE: an application to determine whether a proper hearing has been afforded in terms of the legislative requirement urged in the preceding chapter would be made under this paragraph).

REASONS FOR ADMINISTRATIVE DECISIONS

302. Administrative authorities should be required to give written reasons for their decisions (which reasons should be binding on them in subsequent proceedings) when called on to do so by any persons whose rights, property, or livelihood are affected by such decisions; alternatively the Court should have power, at its discretion, to order reasons to be given. Exceptions in the few appropriate cases should be specifically made by the Legislature.

THE REVIEW FORUM – SUPREME COURT OR ADMINISTRATIVE COURT?

303. This is not an easy problem. On the one hand the Supreme Court has obvious advantages in dealing with alleged errors of law, subject to the defects which sometimes arise from the practice of British courts in relying overmuch on the literal interpretation of a statute. On the other hand, the General Division of the Administrative Court would appear to be better qualified to deal with allegations based on abuse of power and associated matters. It has already been suggested that this division should have jurisdiction over appeals as to the necessity for, and adequacy of, an administrative hearing. If in fact Parliament is prepared to implement at one step the preceding recommendations, then on balance the General Division of the Administrative Court would seem to be the better forum for review. A right of appeal, similar to that in respect of decisions or omissions of the Administrative Court when hearing appeals from tribunals, should lie to the Court of Appeal in this area also. In this way the regular courts will retain ultimate control over the decisions and jurisdiction of the Administrative Court and any dichotomy in the law will be avoided.

304. It may be that the Legislature will hesitate at this stage to bring all local authorities and persons or bodies (other than Government) exercising statutory powers within the ambit of the preceding recommendations. In that case the Supreme Court would be left with its present jurisdiction. While this may be a means of achieving gradual reform it is most undesirable to maintain a permanent distinction in the means of supervision of central Government action on the one hand and other statutory authorities on the other. The need for adequate supervision is equally great in all spheres.

PART VI

16

Appeals Against Administrative Decisions

INTRODUCTORY

305. In the previous chapter present and proposed methods of judicial review of administrative decisions were examined. Judicial review is, however, concerned with the *vires* and legality of an administrative act or decision, and not with its fairness, adequacy, or propriety. In short, review is concerned not with the merits of the decision but with its lawfulness. If the administrative authority acts within his statutory power in making the decision under review and has not erred in interpreting or applying the relevant law the court is *functus officio*. It is only where the Legislature confers a right of appeal that the appellate authority can consider not only the legality but the merits of the decision, and substitute its own view by reversing or modifying the decision under appeal. A right of appeal is more comprehensive and therefore more valuable than judicial review.

ADDITIONAL APPEAL RIGHTS

306. Where possible, a right of appeal should be conferred in preference to restricting the citizen's rights to judicial review or resort to the Ombudsman. Where the Legislature has found it possible to transfer administrative decisions to a tribunal a right of appeal has usually followed. But there remains the vast area of administrative activity where officials or statutory authorities exercise discretionary powers of all kinds. In some cases this administrative discretion is exercised by officials in reliance on their own judgment; in other cases they are largely if not wholly controlled by departmental policy. Where policy considerations are an overriding factor it is probably more difficult to transfer responsibility to an independent tribunal unless the policy is a settled one. Responsibility for policy must rest where it belongs, with the Minister responsible to Parliament or the local authority responsible to its electorate. But between the class of administrative decisions which, to date, it has been found convenient to transfer to tribunals, and those which can only be made by a Minister or subject to his direct control, there surely lie a significant number of

decisions which could be made "subject to the independent check of a tribunal". This is, indeed, the burden of the Whyatt Report. The investigation carried out by Sir John Whyatt and his colleagues, with the cooperation of the British Treasury and selected government departments, revealed various categories of discretionary decision which, they considered, gave rise to a sufficient number of complaints to justify a right of appeal to an independent tribunal.[1] As the Whyatt Committee found, anyone confronting the "unmapped territory of administrative discretion" will have difficulty in identifying "amongst the great mass of administrative procedures, the specific areas of discretion within which the decisions are made". Moreover there remains the "further inquiry as to whether an area of discretion is also *an area of friction*, in the sense that the decisions made within it give rise to a substantial number of complaints from the public".[2] This, as the Committee pointed out, can only be answered by the department itself or now, in New Zealand, by the Ombudsman. That there is a need for some additional check on administrative action is, as has been noted, evidenced by the appointment of the Ombudsman in 1962.

307. The Franks Committee also recognised the need for improvement and expressed "much sympathy with the desire to provide machinery for hearing appeals against administrative decisions generally".[3] Unfortunately its terms of reference did not permit a full review of the situation. The terms of reference of the Whyatt Committee were intended to cover this omission but unfortunately they did not extend to a full investigation into the adequacy of the prerogative orders as a means of correcting maladministration. This Committee contented itself with saying that "(o)ther judicial remedies are limited in scope and where available present peculiar uncertainties and difficulties. . . . Of uncertainties which surround judicial remedies we refer only by way of example to the highly technical complications of the prerogative orders of mandamus, certiorari and prohibition and the somewhat doubtful scope of the more flexible order for a declaration."[4] The Committee recommended that a General Tribunal be set up to deal with miscellaneous appeals from discretionary decisions. They suggested that the type of discretionary decision which could be brought before it should be set out in a statutory order made by the Lord Chancellor after consultation with the Council on Tribunals and the department concerned.[5]

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[1] See Whyatt Report Ch. 5.

[2] idem, par. 21 at 11.

[3] Franks Report, par. 121 at 28.

[4] Whyatt Report, par. 73 at 35.

[5] idem, par. 65–68 at 32.

308. It is urged that a similar step be taken here. All Government Departments should be called on to review their administrative procedures and advise in what areas friction with the public is greatest. The Ombudsman, if not immediately, should soon be in an excellent position in the light of complaints made to him, to advise on these areas in which a right of appeal would be desirable.

309. It should be possible in a number of these areas to confer a right of appeal to the General Division of the proposed Administrative Court, which would be especially well qualified to hear them. The Court should have power to call for additional evidence and to confirm, modify, vary, reverse, or refer back the decisions with appropriate directions. On any such appeal the aggrieved citizen could, of course, raise any matter which he could otherwise raise in proceedings for judicial review.

PART VII

17

The Parliamentary Commissioner (Ombudsman)

PARLIAMENTARY COMMISSIONER (OMBUDSMAN) ACT 1962

FUNCTIONS

310. At the time this report was written, the Parliamentary Commissioner (Ombudsman) Bill was still before Parliament. Since then the Bill has become law and the Ombudsman has assumed office. This Act is a landmark in the field of administrative law and calls for consideration here. It should first be noted that the jurisdiction of the Ombudsman is extremely wide. His principal function is to investigate any decision or recommendation made (including any recommendation made to a Minister of the Crown) or any act done or omitted, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity by any Government Department or associated Government agency listed in the Act, or by any officer, employee, or member thereof, in the exercise of any power or function conferred on him by any Act. It falls short, however, of any decision made by a Minister of the Crown.

PROCEDURE OF OMBUDSMAN

311. The Ombudsman may investigate any such matter on complaint or on his own initiative. His power of investigation is not precluded by any privative clause in any Act. The House of Representatives may make rules for the guidance of the Ombudsman. Every investigation must be conducted in private and before investigating any matter the Permanent Head of the Department or organisation concerned must be notified. The Ombudsman may hear or obtain information from such persons as he thinks fit and make any inquiries he considers necessary. He is not bound to hold any hearing and no person is entitled as of right to be heard. If, however, at any time during the course of an investigation it appears to the Ombudsman that there may be sufficient grounds for his making a report or recommendation which may adversely affect any Department, organisation, or person he must grant a hearing. He may in his discretion, at any time during or after any

investigation, consult any Minister who is concerned in the matter under investigation, and, on the request of any Minister or in any case where any investigation relates to any recommendation made to a Minister, he is required to consult the Minister after making the investigation and before forming a final opinion on the merits or validity of the decision or recommendation. The Ombudsman is empowered to summon and examine on oath any officer, employee, or member of any Department or organisation, any complainant, and, with the leave of the Attorney-General, any other person whom he considers may be able to give relevant information. The disclosure of certain matters relating to the security, defence, or international relations of New Zealand, the investigations or detection of offences, Cabinet deliberations, or proceedings, may, on the certificate of the Attorney-General, be prohibited.

POWERS AFTER INVESTIGATION

312. The Ombudsman is empowered to make a report if after investigation he decides that any decision, recommendation, act, or omission:

(a) appears to be contrary to law; or
(b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or
(c) was based wholly or partly on a mistake of law or fact; or
(d) was *wrong*.

The Ombudsman may also have regard to any case where a discretionary power has been exercised for an improper purpose or on irrelevant grounds or where reasons should have been given for the decision. If in any of the foregoing cases the Ombudsman considers:

(a) that the matter should receive further consideration by the appropriate authority; or
(b) that the omission should be rectified; or
(c) the decision cancelled or varied; or
(d) that any practice on which the decision, recommendation, act, or omission was based should be altered; or
(e) that any law on which the decision, recommendation, act, or omission was based should be reconsidered; or
(f) that reasons should have been given for the decision; or
(g) that any other steps should be taken—

he must report his opinion, with reasons, to the appropriate Department or organisation with such recommendation as he thinks fit. In any such case he may request the Department or organisation to advise him within a specified time of the steps (if any) that it proposes to take to give effect to his recommendations. The Ombudsman must also send a copy of his report to the Minister concerned.

313. If, within a reasonable time after the report is made, no action is taken which seems to the Ombudsman to be adequate and appropriate, he may, after considering any comments from the Department or organisation concerned, send a copy of his report and recommendation to the Prime Minister and may thereafter make such report to Parliament on the matter as he thinks fit. No comment that is adverse to any person shall be made in any report under the Act, unless such person has been given an opportunity to be heard.

314. In addition to his power to make a report under the foregoing provisions the Ombudsman may, under the Ombudsman's Rules 1962 made by the House of Representatives, "from time to time in the public interest or in the interests of any person or Department or organisation, publish reports relating generally to the exercise of his functions under the Act or to any particular case or cases investigated by him, whether or not the matters to be dealt with in any such report have been the subject of a report to Parliament".

315. It may well be that within a relatively short period those classes of administrative decisions which give rise to most friction will become apparent to the Ombudsman. It has been suggested earlier in this report that a right of appeal to the General Division of the Administrative Court should be given in respect of such decisions. If this were granted any such matter could, where desirable, be dealt with in the open, the Court could ensure that the administration disclosed all necessary information, and, most important, the decision of the Court would be binding on the administration and not a recommendation which might not be adopted.

ERRORS OF LAW

316. The Ombudsman's jurisdiction extends to any decision which "appears (to him) to be contrary to law" or "based wholly or partly on a mistake of law".[1] Under existing law a citizen has a right to obtain review of errors of law in some but not all cases. It has been urged in Chapter 15 that this right should extend to *all* errors of law. If the administration is in fact acting unlawfully then the citizen should have ready means of securing a court ruling which will be binding on the administration. As the Act stands, the Ombudsman has in effect a parallel jurisdiction to rule on this important matter, but only by way of recommendation. The

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[1] Parliamentary Commissioner (Ombudsman) Act 1962, section 19 (1) (*a*) and (*c*).

administration can then apparently decide for itself whether it will comply with the law. How a Government Department resolves conflicting rulings by the Ombudsman on the one hand and the Solicitor-General, as legal adviser to the Government, on the other, nowhere appears. If, as has been suggested earlier in this report, the Supreme Court or the Administrative Court as the case may be were given a more ample jurisdiction to deal with questions of law by way of a simplified procedure its decision would be binding unless overruled – which should occur infrequently – by the Court of Appeal. In this way the courts would retain responsibility, as they should, for declaring and enforcing the law.

MALADMINISTRATION

317. The remaining matters falling within the Ombudsman's jurisdiction under section 19 of the Act may be broadly classified as relating to maladministration. It was matters of this kind that the Whyatt Committee recommended should be handled by a British Parliamentary Commissioner. Here again the courts already have jurisdiction, albeit by somewhat antiquated means, over most categories in this area. Suggestions have been made for simplifying court review and transferring jurisdiction to the General Division of the Administrative Court. This division, as has already been stressed, would be especially well qualified to handle allegations of maladministration and abuse of power. If the suggestion for the establishment of an Administrative Court with a General Division is entertained by the Government there will obviously be some duplication of functions. Such would be the case if judicial review of administration remained with the Supreme Court as at present. This is probably an advantage. If a citizen felt sufficiently strongly about his grievance he could seek review in the General Division of the Administrative Court or the Supreme Court as the case may be. Alternatively, he could leave it to the Ombudsman to investigate informally and take his chance that a recommendation of the Ombudsman would be implemented by Government. These considerations apart, the power vested in the Ombudsman to initiate an investigation of his own volition is a valuable one which, properly exercised, could well secure valuable reforms or improvement in administrative practice. Perhaps a happy solution would be to have the Ombudsman also a member of the Administrative Court. The experience accumulated in each sphere would be complementary, and, provided the areas of jurisdiction are clearly defined, the arrangement should work to advantage.

PART VIII

18

Summary of Conclusions

AN ADMINISTRATIVE PROCEDURE ACT

318. Most of the recommendations in this report would require legislative action, and it is suggested that they be included in an Administrative Procedure Act. It is desirable that so far as possible provisions governing administrative justice be contained in the one statute.

319. The recommendations made in respect of tribunals extend to all administrative tribunals of the kind reviewed in Chapters 3 to 10 inclusive. The extent to which they are applied to domestic tribunals regulating professional and trade registration and disciplinary matters should depend upon consultation with representatives of the various bodies concerned.

TRIBUNALS GENERALLY

320. *Membership.* All chairmen and members other than those required by any Act to have special qualifications should first be approved by the Attorney-General.

Tenure of Office. Appointments should be for a fixed term preferably not less than three years.

Method of Appointment. A uniform method, preferably by the Governor-General in Council, is desirable.

GENERAL CODE OF PROCEDURE FOR TRIBUNALS

321. Certain basic procedures to ensure a fair hearing should be followed by all tribunals unless for good cause expressly exempted. These are discussed in Chapter 11 and include matters such as: *Notice* of the time, place, and issues; *Evidence*; *Official Notice*; *Subpoenas*; *Public Hearings*; *Legal representation*; *Privilege*; and a requirement that *Findings and Reasons* be supplied either as of right or on timely request. Tribunals will remain free to prescribe detailed rules.

AN ADMINISTRATIVE COURT

322. *Right of Appeal.* There should be a right of appeal from all administrative tribunals to the Administrative Court.

Constitution of the Court. The present disparate rights of appeal lying to the Supreme Court, the Magistrates' Courts, statutory Appeal Authorities, and *ad hoc* authorities should be consolidated in the proposed Court.

Divisions of the Court. The following divisions of the Court might be desirable; *Licensing* (to include all licensing, transport, motor spirits, etc.); *Town Planning and Local Government; Land Valuation and Settlement*; *Industrial*; *Taxes*; *Trade Practices and Prices*; and a *General Division.*

Functions of the Court. Principally to hear appeals on fact, law, and merits; to rule on all questions of jurisdiction of inferior tribunals and to hear appeals as to the right to, and adequacy of, a hearing by administrative authorities other than tribunals.

Administrative Court Rules Committee. This committee would consist of the Judges of the Court, a representative of the New Zealand Law Society, the Solicitor-General, the Secretary of Justice, and a representative of each Government Department administering a statute under which an appeal lies to the Court; provided that such representative would attend and vote only on rules relating to the statute administered by his Department.

Functions of Rules Committee. To approve, add to, or modify any rules proposed for administrative tribunals; to make and publish rules for the various divisions and subdivisions of the Court and to make recommendations to the Attorney-General touching the constitution, powers, and functions of the Court or any tribunal or other administrative agency.

Appeals from Administrative Court. An appeal would lie to the Court of Appeal against any decision on grounds that it was in excess of jurisdiction, erroneous in law; arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; or made upon unlawful procedure.

RIGHT TO A HEARING

323. The Act should stipulate that any person whose *rights*, *property*, or *livelihood* are adversely affected by administrative action or the exercise of statutory powers should *first* be entitled to a hearing.

Right of Appeal. There should be a right of appeal to the Administrative Court (General Division) as to the right to a hearing and the adequacy of any hearing afforded. The essential elements of any hearing are that notice must be given of any proposed action and that parties affected be given an opportunity to correct or contradict any statement or information prejudicial to their interests. Beyond this the Court would be free to set standards appropriate in any given case.

Licences. An additional provision requiring a hearing before the grant, revocation, suspension, or modification of any licence should be enacted.

JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

324. *Method of Review*. A simple uniform method of review should replace the prerogative writs and actions for injunctions and declarations. The *grounds for review* should be extended to include all errors of law and be codified as set out in paragraph 301.

"Subjective" Discretionary Powers. Discretionary powers should be conferred in "subjective" terms only where necessary.

Crown Privilege. The present rules should be modified to permit more generous discovery of documents in proceedings against the Crown.

Reasons for Administrative Decisions. These should be given on request or when ordered by the Administrative Court.

Review Forum. The Administrative Court should hear all applications for review of administrative decisions subject to a right of appeal to the Court of Appeal.

APPEALS AGAINST ADMINISTRATIVE DECISIONS

325. There should be a right of appeal to the Administrative Court (General Division) in the areas of greatest friction between the public and Government Departments, determined after a periodic review of all Departments or on the recommendation of the Ombudsman.

APPENDIX A

EXTRACT FROM APPEAL PROVISIONS OF THE CINEMATOGRAPH FILMS ACT 1961

Section 83: Evidence in appeals before Licensing Appeal Authority

(1) The Licensing Appeal Authority may receive as evidence any statement, document, information, or matter that may in his opinion assist him to deal effectually with the matters before him, whether or not the same would be otherwise admissible in a Court of law.

(2) Subject to the foregoing provisions of this section, the Evidence Act 1908 shall apply to the Licensing Appeal Authority and to all proceedings before the Licensing Appeal Authority in the same manner as if the Licensing Appeal Authority were a Court within the meaning of that Act.

(3) The Licensing Appeal Authority shall within the scope of his jurisdiction be deemed to be a Commission of Inquiry under the Commissions of Inquiry Act 1908, and, subject to the provisions of this Act, all the provisions of the Commissions of Inquiry Act 1908 shall apply accordingly.

Section 84: Proceedings before Licensing Appeal Authority not to be appealed against

Proceedings before the Licensing Appeal Authority shall not be held bad for want of form; and no appeal shall lie from any order of the Licensing Appeal Authority; and, except on the ground of lack of jurisdiction, no proceeding or order of the Licensing Appeal Authority shall be liable to be challenged, reviewed, or called in question in any Court.

Section 85: Sittings of the Licensing Appeal Authority

(1) Every sitting of the Licensing Appeal Authority shall be held in public and at such place as he deems convenient having regard to the nature of the matter to be decided:

Provided that the Licensing Appeal Authority may in any case, if he considers it is in the interests of the parties or of any of them and is not contrary to the interests of other persons concerned, order that the hearing or any part thereof shall be held in private.

(2) Any sitting of the Licensing Appeal Authority may be adjourned from time to time and from place to place.

(3) The Licensing Appeal Authority may make an order prohibiting the publication of any report or description of the proceedings or of any part of the proceedings in any appeal before him:

Provided that no such order shall be made prohibiting the publication of the names and descriptions of the parties to the appeal, or particulars of any licence or permit or certificate thereby affected, or of any decision of the Licensing Appeal Authority.

(4) Except as otherwise provided in this Act, the Licensing Appeal Authority shall determine his own procedure.

Section 87: Procedure on appeal

(1) Every appeal to the Licensing Appeal Authority shall be in the prescribed form and shall be forwarded to the Secretary for Internal Affairs together with the prescribed fee.

(2) Every such appeal shall forthwith be referred to the Licensing Appeal Authority for determination in accordance with the provisions of this Act.

(3) For the purposes of every such appeal the Secretary for Internal Affairs shall furnish to the Licensing Appeal Authority a copy of the notes of evidence taken by the original authority in connection with the subject-matter of the appeal.

(4) As soon as conveniently may be after the receipt of any appeal, the Licensing Appeal Authority shall fix a time and place for the hearing of the appeal and shall give not less than fourteen clear days' public notice of the time so fixed, and shall also give not less than fourteen clear days' notice in writing to the appellant and to the holder of or applicant for any licence or permit or certificate in respect of which the appeal is made.

Section 88: Hearing and determination of appeal

(1) At the hearing of any appeal, the Licensing Appeal Authority shall hear all the evidence tendered and all representations made by or on behalf of the appellant and other persons which he deems relevant to the subject-matter of the appeal.

(2) In his determination of any appeal the Licensing Appeal Authority may confirm, modify, or reverse the decision appealed against.

Section 89: Licensing Appeal Authority may refer appeals back for reconsideration

(1) Notwithstanding anything in section 88 of this Act, the Licensing Appeal Authority may in any case, instead of determining any appeal under that section, direct the authority whose decision is appealed against to reconsider the matters in respect of which the appeal was made.

(2) In any case where the Licensing Appeal Authority issues a direction under subsection (1) of this section, the decision appealed against shall have no effect, and the authority whose decision is appealed against shall again consider the matter as if no decision had previously been made, and the provisions of this Act shall apply as if that authority had received an original application in respect of the matter to which the direction relates.

(3) Whenever the Licensing Appeal Authority directs under this section that any matter be reconsidered, he shall advise the authority whose decision is appealed against of his reasons for so doing; and that authority in reconsidering the matter shall have regard to those reasons.

APPENDIX B

DISCRETIONARY POWERS OF SOCIAL SECURITY COMMISSION

The following are some of the more important discretionary powers of the Social Security Commission under the Social Security Act 1938 and its amendments.

Section 20 (1) (a). In assessing the value of accumulated property the Commission may include converted property if in its opinion the conversion of the property was not in good faith but was for the purpose of securing an age benefit or an increased rate of benefit.

Section 22 (7). No woman shall be entitled to a widow's benefit unless the Commission is satisfied that she is of good moral character and of sober habits.

Section 23 (b). The Commission may in its discretion increase a widow's benefit by a mother's allowance.

Section 27 (2). In fixing the rate of an orphan's benefit the Commission is to have regard to any property of the child and any special circumstances affecting it.

Section 33 (2) (d). An applicant for invalid's benefit must be of good moral character and sober habits.

Section 40 (d). An applicant for a miner's benefit must be of good moral character and sober habits.

Section 51 (1) (b) and (c). To qualify for an unemployment benefit an applicant must satisfy the Commission that he is willing to undertake work and has taken reasonable steps to obtain suitable employment.

Section 54 (2). The Commission may in its discretion postpone for such period, not exceeding six weeks, as it thinks fit the commencement of an unemployment benefit if the applicant has become voluntarily unemployed without a good and sufficient reason or has lost his employment by reason of misconduct as a worker, or has refused or failed without a good and sufficient reason to accept any offer of suitable employment.

Section 58. If in the opinion of the Commission any applicant for an emergency benefit should undergo a course of training in any occupation or should receive any medical or other treatment . . . or should do any work required of him, the grant or continuance of the benefit may be made subject to the condition that he shall comply with the requirements of the Commission in respect of any such matters.

Section 61 (4). Gives the Commission power to make deductions and additions to the income computed in accordance with subsection (3) in respect of any items by which, in the opinion of the Commission, the beneficiary's income is likely to be reduced or increased as the case may be.

Section 62 (d). Empowers the Commission to refuse to grant any benefit or reduce the amount thereof in any case where in its opinion any applicant for a benefit under Part II of the Act has directly or indirectly deprived himself of any property or income in order to qualify for a benefit.

Section 67 (3). In the event of any change of circumstances of any beneficiary, the Commission may review the benefit at any time and terminate it or vary the amount if the circumstances warrant such action being taken.

Section 68 (2). Empowers the Commission at its discretion to pay a benefit to some other person on behalf of the beneficiary.

Section 70 (2). Provides that the Commission may, at its discretion, having regard to the circumstances of each case, pay the whole or any part of any benefit in respect of any period during which the beneficiary is temporarily absent from New Zealand.

Note: This provision has given rise to protracted proceedings before the Supreme Court and Court of Appeal which might well have been avoided had there been a right of appeal.

Section 71 (2). Enables the Commission, if in its opinion any payment in excess has been obtained by fraud, to recover such excess.

Section 72 (2). Empowers the Commission, having regard to any special circumstances or conditions, to reduce the rate of a benefit other than a superannuation benefit if in its opinion the maximum benefit is not necessary for the maintenance of the beneficiary.

APPENDIX C

EXTRACT FROM MASSACHUSETTS ADMINISTRATIVE PROCEDURE ACT

MASS. ACTS 1954 – CHAP. 681

Judicial Review

Section 14.

Except so far as any provision of law expressly precludes judicial review, any person or appointing authority aggrieved by a final decision of any agency in an adjudicatory proceeding, whether such decision is affirmative or negative in form, shall be entitled to a judicial review thereof, as follows:

Where a statutory form of judicial review or appeal is provided, other than by extraordinary writ, such statutory form shall govern in all respects, except as to standards for review. The standards for review shall be those set forth in paragraph (8) of this section, except so far as statutes provide for review by trial *de novo*. In so far as the statutory form of judicial review or appeal is silent as to procedures provided in this section, the provisions of this section shall govern such procedures.

Where no statutory form of judicial review or appeal is provided, or where the only statutory form of review is by extraordinary writ, judicial review shall be obtained by means of a petition for review, as follows:

(1) Proceedings for judicial review of an agency decision shall be instituted by the filing of a petition for review in the superior court for the county (*a*) where the petitioners or any of them reside or have their principal place of business within the commonwealth, or (*b*) where the agency has its principal office, or (*c*) of Suffolk. The court may grant a change of venue upon good cause shown. The petition shall be filed in the court within thirty days after receipt of notice of the final decision of the agency, or, if a petition for re-hearing has been timely filed with the agency, within thirty days after receipt of notice of agency denial of such petition for re-hearing. Upon application made within the thirty-day period or any extension thereof, the court may for good cause shown extend the time. A copy of the petition shall, within the same period, be served personally or by registered mail upon the agency or one of its members or upon its secretary or clerk.

(2) The petition shall be addressed to the court and shall include a concise statement of the facts upon which jurisdiction and venue are based, facts showing that petitioner is aggrieved, and the ground or grounds specified in paragraph (8) of this section upon which petitioner contends he is entitled to relief. The petition shall demand the relief to which petitioner believes he is entitled, which demand may be in the alternative. Copies of the petition shall be served, personally or by

registered mail, not later than ten days after the institution of the proceeding upon all parties to the agency proceeding in which the decision sought to be reviewed was made. For the purpose of such service the agency upon request shall certify to the petitioner the names and addresses of all such parties as disclosed by its records, and service upon parties so certified shall be sufficient. All parties to the proceeding before the agency shall have the right to intervene in the proceeding for review. The court may in its discretion permit other interested persons to intervene.

(3) The filing of the petition shall not operate as a stay of enforcement of the agency decision, but the agency may stay enforcement, and the reviewing court may order a stay upon such terms as it considers proper.

(4) Within forty days after service of a copy of the petition for review upon the agency, or within such further time as the court may allow, the agency shall file in the court the original or a certified copy of the record of the proceeding under review. The record shall consist of (*a*) the entire proceedings, or (*b*) such portions thereof as the agency and the parties may stipulate, or (*c*) a statement of the case agreed to by the agency and the parties. The expense of preparing the record may be assessed as part of the costs in the case, and the court may, regardless of the outcome of the case, assess anyone unreasonably refusing to stipulate to limit the record, for the additional expenses of preparation caused by such refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(5) Any person served with a copy of the petition for review as provided in paragraph (2) of this section, and who desires to intervene in the review proceeding, shall, within ten days after service of the copy of the petition upon such person, serve upon petitioner and the agency, and file in the court, a notice of intervention stating his interest and the position he takes with respect to the agency decision under review. Service of all subsequent papers or notices in the review proceeding need be made only upon the agency and the parties, who shall include the petitioner, those persons who have filed notices of intervention, and any other persons who have been permitted to intervene by the court.

(6) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court.

(7) If application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material to the issues in the case, and that there was good reason for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and decision by reason of such additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modified or new findings or decision.

(8) The court may affirm the decision of the agency, or remand the matter for further proceedings before the agency; or the court may set aside or modify the decision, or compel any action unlawfully withheld or unreasonably delayed, if it determines that the substantial rights of any party may have been prejudiced because the agency decision is—

(*a*) In violation of constitutional provisions; or
(*b*) In excess of the statutory authority or jurisdiction of the agency; or
(*c*) Based upon an error of law; or
(*d*) Made upon unlawful procedure; or
(*e*) Unsupported by substantial evidence; or
(*f*) Unwarranted by facts found by the court on the record as submitted or as amplified under paragraph (7) of this section, in those instances where the court is constitutionally required to make independent findings of fact; or
(*g*) Arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.

The court shall make the foregoing determinations upon consideration of the entire record, or such portions of the record as may be cited by the parties. The court shall give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it.

If the court finds that the action of the appointing authority in discharging, removing, suspending, laying off, transferring from his office or employment without his consent, lowering in rank or compensation or abolishing his position, or the action of the commission confirming the action taken by the appointing authority, was not justified, the employee shall be reinstated in his office or position without loss of compensation and the court shall assess reasonable costs against the employer.

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PUBLIC & ADMINISTRATIVE LAW REFORM COMMITTEE

26 February 1974

Mr G.S. Orr,
Deputy Chairman,
STATE SERVICES COMMISSION.

Administrative Division of the
Supreme Court

I have perused the legislation passed since the Judicature Amendment Act 1968 and, so far as I have been able to determine, the following provisions appear to be those that confer jurisdiction on the Administrative Division of the Supreme Court:

Broadcasting Act 1973, s.85.
Land Valuation Proceedings Amendment Act 1968, s.2.
War Pensions Amendment Act 1968, s.4.
Sale of Liquor Amendment Act 1968, s.3.
Cinematograph Films Amendment Act 1969, s.4.
Animal Remedies Amendment Act 1969, s.8.
Land Amendment Act 1970, s.12.
Medical Practitioners Amendment Act 1970, s.2.
Pharmacy Act 1970, s.40.
Trade Practices Amendment Act 1971, s.14.
Mining Act 1971, s.239.
Town & Country Planning Amendment Act 1971, s.11.
Distillation Act 1971, ss. 11 and 20.
Nurses Act 1971, ss. 46 and 47.
Soil Conservation & Rivers Control Act 1941,
 s.103 and s.106B.
Clean Air Act 1972, s.35.
Coal Mines Act 1925, s.28C.
Accident Compensation Act 1972, s.168.
Social Security Act 1964, s.12Q.
Plant Varieties Act 1973, s.30.

(R.M. Barlow)
Secretary

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